

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 161

**JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR, PETITIONER**

VS.

**KENTUCKY FINANCE COMPANY, INC. AND
KENTUCKY DISCOUNT, INC.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT**

**PETITION FOR CERTIORARI FILED JULY 9, 1958
CERTIORARI GRANTED OCTOBER 13, 1958**

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STATES DEPARTMENT OF LABOR, PETITIONER

vs.

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A In United States Court of Appeals for the Sixth Circuit

No. 13287

KENTUCKY FINANCE COMPANY, INC., ET AL., DEFENDANTS,
APPELLANTS

versus

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES
DEPARTMENT OF LABOR, PLAINTIFF, APPELLEE

Appendix to the brief for appellants

Filed September 16, 1957

[File endorsement omitted.]

1 In United States District Court for the Western District
of Kentucky, Louisville Division

Civil Action File No. 2846

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES
DEPARTMENT OF LABOR, PLAINTIFF

v.

KENTUCKY FINANCE COMPANY, INC., A CORPORATION, AND
KENTUCKY DISCOUNT, INC., A CORPORATION, DEFENDANTS

Complaint

Filed October 11, 1954

I

Plaintiff brings this action to enjoin defendants from violating the provisions of Sections 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act of 1938, as amended (Act of June 25, 1938, c. 676, 52 Stat. 1060; Act of October 26, 1949, c. 736, 63 Stat. 910; U. S. C. Title 29, Sec. 201, et seq.), hereinafter referred to as the Act.

II

(a) Jurisdiction is conferred upon the court by Section 17 of the Act and by Section 24 (8) of the Judicial Code revised effective September 1, 1948, U. S. C. Title 28, Section 1337.

(b) Under the provisions of Reorganization Plan No. 6, dated March 13, 1950, effective May 24, 1950, issued under the Reorganization Act of 1949, U. S. C. Title 5, Sec. 133 (z), et seq., the functions of the Administrator of the Wage and Hour Division, United States Department of Labor, under the Fair Labor Standards Act, have been transferred to the Secretary of Labor.

2

III

Defendants, Kentucky Finance Company, Inc., and Kentucky Discount, Inc., are separate corporations, authorized under and existing by virtue of the laws of the Commonwealth of Kentucky, and jointly maintain and operate an office and place of business located at 225 South Fifth Street, Louisville, Jefferson County, Kentucky, within the jurisdiction of this court, where they are engaged in the business of making small loans and financing installment purchases of merchandise.

IV

At all times hereinafter mentioned, the two defendant corporations jointly have employed and are employing approximately nine full-time and two part-time employees. As a regular part of their business operations the defendants make loans to and receive payments from persons living outside the State of Kentucky and regularly communicate by mail, telegraph and telephone with persons residing outside the State of Kentucky. At the time of making a loan defendants endeavor to and generally do persuade the borrower to purchase protective life insurance in the amount of the loan. Defendants prepare applications for such life insurance, in quadruplicate, one copy of which is intended for and subsequently is transmitted to the out-of-state insurer. The defendants perform these functions through their employees who, by reason of activities in the above connection and by reason of making out-of-state trips to appraise the value of chattels pledged as security and to collect delinquent accounts, are engaged in interstate commerce and the production of goods for interstate commerce within the meaning of the Act.

3

V

During the period since August 1, 1952, the defendants repeatedly have violated and are violating the provisions of

Sections 7 and 15 (a) (2) of the Act by employing many of their employees in commerce and in the production of goods for commerce, as aforesaid, for work-weeks longer than forty (40) hours without compensating said employees for their employment in excess of forty (40) hours in said workweeks at rates not less than one and one-half times the regular rates at which they were employed.

VI

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11 (c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours, and other conditions and practices of employment to be made, kept and preserved by every employer subject to any provisions of the Act. The said regulations, and amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

VII

During the period since August 1, 1952, the defendants, employers subject to the provisions of the Act, repeatedly have violated and are violating the provisions of Sections 11 (c) and 15 (a) (5) of the Act in that they have failed to make, keep and preserve adequate and accurate records of the wages, hours and other conditions and practices of employment maintained by them, as prescribed by the said regulations, in that the records kept by defendants failed to show adequately and accurately, among other things, the home addresses and
 4 occupations, the hours worked, each workday and total hours worked each workweek, the regular hourly rate of pay, the total daily or weekly straighttime earnings or wages, the total overtime excess compensation and the total wages paid each pay period with respect to many of their employees.

VIII

Defendants have, since August 1, 1952, repeatedly violated the aforesaid provisions of the Acts. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff prays judgment permanently enjoining and restraining the defendants, their officers, agents, servants, employees, attorneys, and all persons acting or claiming to act in their behalf and interest, from violating the provisions of Sections 15 (a) (2) and 15 (a) (5) of the Act, and such other and further relief as may be necessary and appropriate.

(S) STUART ROTHMAN,

Solicitor,

(S) JETER S. RAY,

Regional Attorney,

(S) MARVIN M. TINCHER,

Attorney,

United States Department of Labor.

Post Office Addresses: Office of the Solicitor, U. S. Department of Labor, United States Court House, 801 Broad Street, Nashville 3, Tennessee or Office of the Solicitor, U. S. Department of Labor, Washington 25, D. C.

5

In United States District Court

Answer of Defendant, Kentucky Finance Company, Inc.

Filed Nov. 2, 1954

FIRST DEFENSE

The Complaint fails to state facts upon which relief can be granted.

SECOND DEFENSE

The defendant, Kentucky Finance Company, Inc., admits the allegations of paragraphs (a) and (b) of the paragraph II of plaintiff's Complaint and further admits the allegations in paragraph III and so much of paragraph IV thereof as alleges that this defendant, Kentucky Finance Company, Inc., and its co-defendant, Kentucky Discount, Inc., have employed approximately nine full time and two part time employees.

THIRD DEFENSE

The defendant, Kentucky Finance Company, Inc., denies each and every allegation of the plaintiff's Complaint not specifically admitted herein.

FOURTH DEFENSE

The defendant, Kentucky Finance Company, Inc., says that if any of its employees are engaging in any activities in their employment with the defendant, that would be engaging in commerce or in producing goods for commerce, this defendant and its employees are exempted from the provisions of the Fair Labor Standard Act of 1938 as amended under the provision of United States Code titled 29 Section 213A2.

(S) FRANK A. LOGAN,

FRANK A. LOGAN AND HENSLEY &
LOGAN AND FRED B. REDWINE,

606 Ky. Home Life Building,
Louisville 2, Kentucky, Wa. 1333.

6 I certify that a copy of the foregoing Answer was this 1st day of November, 1954 mailed to Jeter S. Ray, Regional Attorney, U. S. Department of Labor, 801 Broad Street, Nashville 3, Tennessee.

(S) FRANK A. LOGAN.

In United States District Court

Answer of Defendant, Kentucky Discount, Inc.

Filed Nov. 2, 1954

FIRST DEFENSE

The Complaint fails to state facts upon which relief can be granted.

SECOND DEFENSE

The defendant, Kentucky Discount, Inc., admits the allegations of paragraphs (a) and (b) of the paragraph II of plaintiff's Complaint and further admits the allegations in paragraph III and so much of paragraph IV thereof as alleges that this defendant, Kentucky Discount, Inc., and its co-defendant, Kentucky Finance Company, Inc., have employed approximately nine full time and two part time employees.

THIRD DEFENSE

The defendant, Kentucky Discount, Inc., denies each and every allegation of the plaintiff's Complaint not specifically admitted herein.

FOURTH DEFENSE

The defendant, Kentucky Discount, Inc., says that if any of its employees are engaging in any activities in their employment with the defendant, that would be engaging in commerce or in producing goods for commerce, this defendant and its employees are exempted from the provisions of the Fair Labor Standards Act of 1938 as amended under the provision of United States Code titled 29 Section 213A2.

(S) FRANK A. LOGAN,

FRANK A. LOGAN AND HENSLEY &

LOGAN AND FRED B. REDWINE,

606 Ky. Home Life Building,

Louisville 2, Kentucky, Wa. 1333.

I certify that a copy of the foregoing Answer was this 1st day of November, 1954 mailed to Jeter S. Ray, Regional Attorney, U. S. Department of Labor, 801 Broad Street, Nashville 3, Tennessee.

(S) FRANK A. LOGAN.

In United States District Court

Stipulation

Filed May 2, 1955

In an effort to shorten the trial the parties hereby stipulate and agree as follows:

1. Defendants concede for purposes of this action only that they have not, prior to the filing of this action, complied with the provisions of Section 7 and Section 11 (c) of the Fair Labor Standards Act of 1938, as amended (hereinafter called the Act).

2. Plaintiff concedes for the purposes of this action that the minimum wage and overtime provisions of the Act presently do not apply to defendants' general manager and collection manager at the Louisville No. 1 Branch (more particularly described in paragraph 6 hereunder and hereinafter referred to as the Louisville Office), by reason of Section 13 (a) (1) of the Act and Regulations, Part 541, duly promulgated thereunder.

ISSUES PRESENTED

3. The parties agree that the following are the principal questions of law involved in the case.

(a) Whether any of the employees employed by defendants' Louisville Office, other than the general manager and the collection manager, are engaged in commerce or the production of goods for commerce, within the meaning of the Act.

(b) Whether employees employed by the Louisville Office other than the general manager and the collection manager, are exempt from the minimum wage and overtime provisions of the Act by reason of Section 13 (a) (2) thereof, on the ground that they are employed by a retail or service establishment within the meaning of the Act.

STIPULATION OF FACTS

4. It is stipulated that solely for the purposes of this action the following facts are true and correct and that either party may offer this stipulation as evidence. Each party, however, reserves the right to question the relevancy and materiality of any of the facts so stipulated and to adduce additional evidence at the trial with respect to the issues involved in the case.

5. Defendants' corporate names are "Ky. Finance Co., Inc. No. 1, Louisville, Ky." and "Ky. Discount, Inc., Louisville, Ky." Defendants are hereinafter designated as Kentucky Finance and Kentucky Discount, and are separate and distinct corporations organized under the laws of the Commonwealth of Kentucky, having their principal office at 225 South Fifth Street, Louisville, Jefferson County, Kentucky, and their registered office located at 409 Central Bank Building, Lexington, Kentucky. Both defendants are wholly owned subsidiaries of "Kentucky Finance Co., Inc." whose registered office and principal office is located at 409 Central Bank Building, Lexington, Kentucky.

6. Kentucky Finance and Kentucky Discount maintain a joint office at 225 South Fifth Street in Louisville, Jefferson County, Kentucky. As of October 11, 1954, the principal officers in "Kentucky Finance Co., Inc." Kentucky Finance and Kentucky Discount, were Garvice D. Kincaid, President, Frank G. Trimble, Vice President, and R. E. Curtin, Secretary-Treasurer. Each is separately incorporated and the "Ky. Finance Co., Inc. No. 1, Louisville, Ky." is licensed to do

business under KRS Chapter 288, as a licensee at the Louisville address.

7. At the said Louisville Office Kentucky Finance makes personal and chattel loans of cash in amounts ranging from \$5 to \$300. At the same office Kentucky Discount purchases conditional sales contracts through procedures set out in paragraph 10 hereafter. All employees in the Louisville Office perform duties in the same capacity for both defendants. All loans by Kentucky Finance and all purchases of conditional sales contracts by Kentucky Discount are made, consummated and executed at the Louisville Office at 225 South Fifth Street, in Louisville, Jefferson County, Kentucky, and it is this office at which the transactions creating the loan or purchase are negotiated.

8. When an applicant for a personal or chattel loan appears at the Louisville Office, a loan application is made out on a

10 Kentucky Finance form generally by the defendants' manager, collection manager or cashier. The information filled in on the application form includes the name and address of the applicant, place of employment and length of time there employed, rate of earnings and names of credit references. As soon as the application form is completed, a designated employee of defendants proceeds by telephone to verify the information given by the applicant and to ascertain his credit standing from appropriate sources. If satisfactory credit information is received, the loan is approved, a loan contract is filled out and executed, and the applicant receives the net proceeds of the loan in cash. In those instances where personal property, such as an automobile or household goods, is pledged as security, completion of the loan is delayed until an assistant manager, an "outside man," can make an appraisal of the security. The chattel mortgage taken on the borrower's property is then recorded in the office of the Clerk of the County in which the borrower resides.

9. Whenever a loan is arranged, the person taking the application therefor informs the borrower that protective life insurance to cover the amount of the loan is available at a small additional cost. The advantages of having the insurance protection are pointed out to the borrower, and while the borrowers are informed there is no requirement to purchase the insurance, approximately 85% of them do so.

The employee who types the loan contract also prepares the application for life insurance in quadruplicate on forms supplied for this purpose. The insurance application forms referred to are attached hereto as Appendix A. The borrower pays the full premium on the insurance at the time the loan is closed.

10. The procedure followed by Kentucky Discount in purchasing conditional sales contracts varies somewhat from that described above. In this situation generally

11 the dealer making the sale, all of which dealers are located in Kentucky, takes the credit application from the purchaser and relays the necessary information contained therein to Kentucky Discount by telephone. A designated employee thereupon makes the necessary telephone inquiries on the applicant's credit standing and conveys the information to the manager or cashier of Kentucky Discount, who promptly advises the dealer by telephone of the report received and whether Kentucky Discount will accept the conditional sales contract. If the credit information is satisfactory, the dealer completes the sale by having the purchaser execute a conditional sales contract covering the transaction. Following delivery of the merchandise to the purchaser the dealer forwards the conditional sales contract and a signed copy of the delivery ticket to Kentucky Discount. The latter in turn makes its remittance to the dealer and sends a payment book to the purchaser with a letter advising him to make the agreed payments directly to Kentucky Discount as it has purchased the contract. In some instances the dealer may consummate the sale and conditional sales contract before contacting Kentucky Discount or after receiving from Kentucky Discount an unfavorable credit report on the prospective installment purchaser. In either of the latter situations, Kentucky Discount is under no obligation to accept the contract. In most instances Kentucky Discount retains the right to turn the obligation back to the dealer for a refund whenever it proves to be uncollectible.

11. In connection with all accounts handled by both Kentucky Finance and Kentucky Discount, an employee in the Louisville Office makes out a ledger card containing such information as the borrower's name, address, security, dealer's name (if any), amount of loan, number of payments to

12 be made, amount of each payment and day of month on which payment is due. Upon receipt of payments,

whether by mail or in person, credit entries are posted to this ledger card. The loan contract, a copy of the application for protective life insurance, together with the policy (when obtained), and any chattel mortgages related to the loan are filed in individual folders kept in the Louisville Office.

12. Kentucky Finance makes loans to and receives payments from borrowers residing outside the State of Kentucky, and other finance companies throughout the United States send loans made by them to this company for collection when the borrowers move into the area served by it. Likewise, Kentucky Finance receives loan payments from its borrowers who have moved to points outside the State of Kentucky after obtaining a loan. Borrowers who reside outside Kentucky may make their payments to defendants by mail, in which case they transmit their payment book with each payment. After making the appropriate credit entry therein, defendants return the payment book to the out-of-state borrower.

13. As of July 22, 1954, the combined accounting report of Kentucky Finance and Kentucky Discount to their registered office in Lexington, Kentucky showed 1,902 loans outstanding, of which 171 or 8.9 percent, were loans to out-of-state borrowers. The dollar volume of these 1,902 loans was \$295,743.95, of which \$29,309.75 or 9.9 percent, represented amounts due from defendant's out-of-state borrowers.

14. With the exception of the general manager, collection manager and cashier, the activities of defendants' office employees include accepting and receipting for loan payments, typing loan agreements and insurance applications, typing loan account books and ledger cards, posting payments to ledger cards and loan account books, addressing envelopes and preparing overdue notices. The cashier, in addition to her supervisory duties, among other things makes up a cash balance sheet, a report on insurance sold and premiums collected each day, writes checks, pays out loans, buys discount paper and makes bank deposits.

15. The assistant managers, "outside men," employed by the Louisville Office contact seriously delinquent borrowers. Also, when a borrower pledges property one of these assistant managers makes an appraisal of the property mortgaged and makes his report to the defendant. The collection work done by assistant managers consists mainly of personal interviews with delinquent borrowers to persuade them to resume pay-

ments. Occasionally, cash collections are obtained by an assistant manager and turned in to the Louisville Office, together with a copy of the temporary receipt given the borrower when the payment was received.

The assistant managers alternate in performing work inside the Louisville Office. This work includes interviewing loan applicants, taking loan and insurance applications, closing loans, soliciting loans by telephone from former borrowers and calling delinquent borrowers by telephone.

16. It is further agreed that with reference to the issue stated in paragraph 3 (b) above the parties, or either of them, may file as evidence herein, subject to all proper objections as to relevancy and materiality which may be made at or before the trial of this cause, the transcript, or any part thereof, of testimony taken at the trial of the case entitled Maurice J. Tobin, Secretary of Labor, United States Department of Labor, Plaintiff v. Household Finance Corporation, Household Consumer Discount Company and George E. Robey, as
14 individual, Defendants, in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 10549.

Dated May 2, 1955.

KENTUCKY FINANCE COMPANY, INC., AND
KENTUCKY DISCOUNT, INC.,

Defendants.

By (S) HENSLEY & LOGAN,
(S) FRANK A. LOGAN,

Attorneys for Defendants.

(S) Stuart Rothman,
STUART ROTHMAN,
Solicitor of Labor,

(S) Jeter S. Ray,
JETER S. RAY,
Regional Attorney,

(S) Marvin M. Tinchler,
MARVIN M. TINCHER,
Attorney,
Attorneys for Plaintiff.

No. 12515

INSURANCE APPLICATION

To the Authorized Agent of the Credit Life Insurance Co.:

I hereby apply for a life insurance policy to protect the loan described below. I understand that the enclosed premium is the entire amount that I will have to pay for this insurance protection. It is also my understanding, that, if my application is accepted, I will receive a policy and that the enclosed premium will be returned to me at the address shown below in case my application is declined.

Insurance to begin 19...., on loan account
No.

My full name is

My address is

My present age is years.

Term of insurance months. (Same as the number of months required to pay off the loan.)

Original amount of insurance \$. (Same as the total amount of the loan.)

Type of insurance desired diminishing term,
..... level term. Premium for insurance \$.....

R'd. Cr.

Second beneficiary

Creditor

The creditor (first beneficiary) is authorized to pay the premium for such insurance from the proceeds of the loan. This insurance was voluntarily taken and was not required as a condition to the granting of the loan.

Signature

Date of application 19....

Agent's copy.

Be sure to fill in all blanks, sign and enclose proper premium.

16

In United States District Court

Supplemental stipulation

Filed Dec. 15, 1955

For the purposes of consideration of the retail exemption issue only, it is further stipulated that the facts regarding the offices of the defendant corporations herein shall be deemed to be sufficiently analogous to those regarding the Lancaster offices of Household Finance Corporation as set forth in the Stipulation of Facts in the record of *Tobin, Etc. v. Household Finance Corporation, Et Al.*, Civic Action File No. 10549, United States District Court for the Eastern District of Pennsylvania, so that the testimony of the witnesses and all exhibits in that case may be deemed to be applicable and relevant to the offices of the corporate defendants herein.

It is understood that either party shall be free to point out elements of factual difference between Household and the instant case and to adduce additional factual and expert evidence if such should be desired.

(S) JETER S. RAY,

(S) MARVIN M. TINCHER,

Attorneys for Plaintiff.

(S) FRANK A. LOGAN,

(S) THOS. S. DAWSON,

Attorneys for Defendants.

17

In United States District Court

Supplemental stipulation

Filed Dec. 15, 1955.

In addition to the matters heretofore stipulated, it is hereby stipulated that:

1. Reports submitted by defendants to their registered office show the following information concerning amount and nature of business outstanding as of the dates indicated:

Date	Kentucky Finance personal and chattel loans		Kentucky Discount installment sales contracts	
	(a) Number	(b) Amount	(a) Number	(b) Amount
Jan. 1, 1953.....	1277	\$261,362.21	1722	\$182,003.03
July 1, 1953.....	1235	242,104.24	1337	130,330.12
Jan. 1, 1953.....	1306	252,364.81	1010	76,638.77

During the calendar year 1954 defendant Kentucky Finance made a total of 1376 personal and chattel loans in the total amount of \$313,931.80. In the same period defendant Kentucky Discount purchased a total of 1731 conditional sales contracts in the total amount of \$258,169.61.

2. The work of defendants' office personnel is not segregated with reference to where the borrower or installment purchaser resides.

(S) JETER S. RAY,

(S) MARVIN M. TINCHER,
Attorneys for Plaintiff.

(S) FRANK A. LOGAN,

(S) THOS. S. DAWSON,
Attorneys for Defendant.

18

In United States District Court

Order amending pleadings

Entered on Dec. 15, 1955

By agreement of the parties and for good cause shown, the complaint herein, the separate answers of the two defendants, the stipulation heretofore filed, the supplemental stipulation and all other pleadings and orders heretofore filed herein are hereby amended to designate the defendants by their respective exact corporate names which are: Ky. Finance Co., Inc. No. 1, Louisville, Ky., and Ky. Discount, Inc., Louisville, Ky.

Defendants, Ky. Finance Co., Inc. No. 1 of Louisville, Ky. and Ky. Discount, Inc., Louisville, Ky., shall be deemed to have adopted the answers and stipulation heretofore filed herein and to have entered their appearances herein for all purposes connected with this litigation.

Dated 12/15/55.

(S) HENRY L. BROOKS,
United States District Judge.

Entry of the foregoing order is hereby agreed to: Ky. Finance Co., Inc. No. 1 of Louisville, Ky.; Ky. Discount, Inc., Louisville, Ky.

By (S) FRANK A. LOGAN,
(S) THOS. S. DAWSON,
Attorneys for Defendants.
(S) JETER S. RAY,
(S) MARVIN M. TINCHER,
Attorneys for Plaintiff.

19 In United States District Court

Transcript of evidence

Filed Jan. 16, 1956

PROCEEDINGS

9:30 a. m., December 15, 1955

By the COURT. We will call the case of James P. Mitchell, Secretary of Labor, against the Kentucky Finance Company and the Kentucky Discount Company.

Mr. DAWSON. Your Honor, before we get into the case, may I introduce to the Court Mr. Charles Kelly of Chicago and Mr. Harold Levin from New York. They are each lawyers of their respective bars and in good standing, and I will vouch for them. And I'd like to request that they be granted permission to participate in this case from time to time.

By the COURT. All right. And that motion will be granted, gentlemen.

Mr. DAWSON. And, if Your Honor please, in this case that is up for trial today, first we have an agreed order amending the pleadings, because the corporate names of the two defendants are inaccurately stated in the caption in the pleadings, and the correct corporate names are set out in this order, and both parties have agreed to it, and so it's filed. And I'd like to get it signed in order to correct the exact name.

By the COURT. All right. Gentlemen, a stipulation has been filed in this record. What additional proof is going to be required?

Mr. DAWSON. If Your Honor please, that stipulation, I think, has been filed. I don't think it's been formally made a part of the record at this time.

By the COURT. Without objection?

20 Mr. RAY. No objection, Your Honor.

By the COURT. All right. That will be done.

Mr. RAY. Should that be designated in some particular way, or just the original stipulation?

Mr. DAWSON. Original stipulation, I think, would be—

Mr. RAY. Filed and introduced in evidence.

By the COURT. Filed on May the 2nd, 1955.

Mr. RAY. I understand it now, it's in evidence and becomes a part of the record in this case?

By the COURT. That's correct.

Mr. DAWSON. Now, in addition to that we have a supplemental stipulation which straightens out a few questions in connection with the admissibility of some evidence in another case, the Household Finance case of Pennsylvania, and I'd like—that's been agreed to—I'd like to file that and have that made a part of the record and considered as evidence in the case.

By the COURT. All right. Without objection?

Mr. RAY. We approve of the stipulation.

Mr. DAWSON. Now, Your Honor asked if we would have some witnesses. There will be some witnesses, but the defendants, I think, will save the Court and government a good deal of time by what I'm about to say. As Your Honor knows from the pleadings, there was—two issues in this; one is whether or not the employees of defendant corporation are engaged in production of goods for commerce so that the Act covers them, and the other is whether or not the defendants' operations are such as would come within the exemptions of 13 (a) (2) of the Act giving exemption to a retail service establishment.

At this time, and in order to save time, may I get to the second point about the exemption question. The defendants will concede for the purposes of this case only that some
21 of the employees of the defendant are engaged in commerce so that that question, I think, will go out of the case, and we can get directly to the question which we think is the real question involved here.

Mr. RAY. Responding to counsel's proposal, Your Honor, in order to clarify it perhaps a bit, I make inquiry as to whether

defendant—defendants are agreeing that the Court may find that defendants' employees, those involved in this action—excluding the manager and assistant manager as I recall by stipulation—are engaged in commerce or in production of goods for commerce so that they would be entitled to the benefits of the Fair Labor Standards Act. That is, the minimum wage and overtime benefits of the Wage and Hour Law for the purpose of this case only. Is that in effect what counsel proposes?

Mr. DAWSON. Well, there can't be a contested finding. It's an admitting finding. We are merely conceding for the purpose of this case that the exemption should go, and we don't know—I don't know which employees would be covered. Probably two employees are engaged in activities that we are talking about and probably two would be covered by this Act. So that's as far as I can go. I'm willing to concede for the purposes of this case that some of our employees are engaged in production of goods for commerce—engaged in commerce, interstate commerce.

By the COURT. Well, does that satisfy the government?

Mr. RAY. That isn't quite broad enough, Your Honor. We have to insist that that remain an issue in the case, because it's our contention that all employees of the defendants are engaged both in commerce and in production of goods for commerce, unless they are specifically exempt. Now, we
22 have stipulated that two employees of the defendants are within the category of those who are specifically exempt. So, absent a definite concession on the part of the defendants that all employees of the defendants, unless they are exempt by some other provision of the Act, are within the general coverage of the Act, then it would be necessary for us to—to offer such evidence as necessary, and take the position that they are so within the general coverage of the Act.

Mr. DAWSON. I don't understand the prayer of the petition to be presented that day. The suit is for an injunction against the defendant companies compelling them to keep records in compliance—in fact, to stop them from failing to keep records and keep the overtime, if there is any overtime. But an injunction would go on what I have said. I have no doubt about that. Now, the pleadings are not drafted so that the only thing asked is an injunction. What I have conceded is sufficient for the basis for an injunction. That's as far as this case goes.

It's not an action for recovery of overtime; no one involved in it. It's simply an injunction suit.

By the COURT. But the prayer is that the plaintiff prays for an injunction permanently enjoining and restraining the defendants, their officers, agents, servants, employees, attorneys, and all persons acting or claiming to act in their behalf and interest, from violating the provisions of Sections 13 (a) (2) and 13 (a) (5) of the Act.

Mr. DAWSON. Well, as I understand, what I've been saying, I'm conceding that they are entitled to the injunction that they asked for unless we come within the exemption.

By the COURT. Well, that's certainly broad enough.

Mr. RAY. Well, if that is what he really means, I will agree it's broad enough. But in stating it he said that some
23 of the employees were covered by the Act—that is, engaged in commerce—and our impression is that all employees in their Louisville office are so engaged in commerce and in production of goods for commerce.

By the COURT. It seems that would follow from what Judge Dawson has said, and if that is the understanding of counsel, that will be the way it will be recorded.

Mr. RAY. Well, that is satisfactory if it is so understood.

Mr. DAWSON. All right. Now, if Your Honor please—

Mr. RAY. On the basis of that, Your Honor, and in order to place the case in its proper perspective in view of the stipulation, it would, I think, now be appropriate for the plaintiff to rest its case to the Court.

Mr. DAWSON. That's right.

Mr. RAY. And we so do.

By the COURT. All right.

Mr. DAWSON. Well, that is entirely correct. The burden now shifts to the defendants to bring themselves within this Section 13 (a) (2) which gives an exemption to retail sales and service establishments.

Now, if Your Honor please, we will have two witnesses here besides other evidence that will be put in the record through agreement. And in order to clarify the issues that are here I believe that a short opening statement might help the Court and perhaps get us down to just what the Court has to decide.

By the COURT. All right.

OPENING STATEMENT ON BEHALF OF DEFENDANTS BY
MR. DAWSON

Mr. DAWSON. And if the Court is agreeable I'd like to take just a few minutes to go into that. Can you hear me all right?

Of course, as we just said, this suit seeks an injunction, and it goes of course unless we establish that we are a retail service establishment within the meaning of the exemption section of the Fair Labor Standards Act.

Now, the case itself probably involves two or three employees. But it is a test case, and therefore is of great importance. It does affect the whole industry, and for that reason the case becomes one of importance. It's probably the—as far as I know, it's the second case, test case, in which this exemption question was raised. The other case will be referred to a good many times during the trial of this case. It was principally a case in Federal Court in the Third Circuit. It went to the Court of Appeals and was reversed on the commerce question, and the exemption issue was not determined on appeal.

Now, the two companies, the defendants here, are in one office. Only one office is involved. That is located here at 235 South 5th Street, and the operation is that of a small loan company, which is the Kentucky Finance Company which buys instalment sales contracts or conditional sales contracts from dealers covering consumer, household products. That is, refrigerators, television sets, deep freezers, furniture, and things of that sort. It's based on this entirely. So the operation of the defendants and the money they loan and the credit they extend is always invariably extended in loan to an individual consumer. In other words it's at the end of the line; there's no further place for this money to go. It goes to the ultimate consumer, and to the individual in each case.

Now, the operations, of course, are strictly local. Something like nine or ten percent of the various loans are across the river into Indiana. Therefore, the concession which we have just made. But it's all within the local trading area, and probably within a radius of fifteen miles. In other words, it's strictly a local business. That office, of course, is available to the retail districts and to the shopping centers of the city.

Now, the credit—and this would be an important feature of the case as will be developed later on—credit in every

instance is extended to an individual consumer, so it's the individual consumer's credit that is always involved.

Now, the statute involved, of course, is the Fair Labor Standards Act which was passed back in 1938-1939, of course, for the purpose of requiring the payment of—of avoiding substandard wages and paying overtime for longer hours.

Now then, prior to 1949 this statute that we are talking about—I mean, this section, this exemption section that we are talking about read this way, "Any employee engaged in any retail or service establishment, the greater part of whose selling or service is in interstate commerce, is exempt from the Act." Now, that was the language that congress originally used when they passed the Fair Labor Standards Act. So you will see there that there is no definition of a retail sales or service establishment. That's all that was said. It was left to the administrators and the courts to define what a retail service establishment or retail sales establishment might be so far as to afford the exemption.

Now, from 1939 and '40 on up the next ten years, the administrators of the Wage and Hour division gradually curtailed the effect of that retail exemption, and they restricted its application to such an extent that congress in 1949 amended that Section 13 (a) (2) and spelled out for itself what retail service establishment—a retail sales and service establishment is. And instead of giving the finding of what a retail establishment would be, they defined it within the Act itself. So
26 by the '49 amendment the 13 (a) (2) was changed to read this way, "Any employee employed by any retail or service establishment, more than fifty percent of which establishment's annual dollar volume of sales of goods or service is made within the state in which the establishment is located. A retail or service establishment—here's the definition to it—a retail or service establishment shall mean an establishment seventy-five percent of whose annual dollar volume of sales of goods or services, or both, is not for resale and is recognized as retail sales or services in the particular industry."

So there's three tests, the last one being the one that we are particularly concerned with. Now, of course, the first one, more than half of the sales or services must be intrastate; at least seventy-five percent of the sales or services, as the case may be, must not be for resale. Now, those two, we meet, and I don't see how there can be any question about that. We

meet the first two of the three tests. And that leaves us, of course, to the question which is the only question in this case, whether or not the operations that we're engaged in are recognized as retail services in the particular industry.

Now, that—that question is going to depend on what Congress intended by this addition of the recognition, the industry recognition, test. Now, our position is that the Congress intended to broaden the scope of the exemption, that Congress felt that the exemption, and its application had been restricted so that it was much narrower than Congress originally intended, and that the Administrator had been applying the exemption in such a manner that the Act covering the employees of too many local businesses, and that's what Congress was trying to get away from.

27. So, we are going to contend to Your Honor that the Congress in adopting this industry recognition test established that as the exclusive test—not thinking about the first two now; I don't think they are involved here. But on this that was the exclusive test to determine whether or not the industry was a retail sales or service establishment. So, in the Administrator's contention, and his contention is this, that this was an added test—that the industry recognition test was an added test, that you still had to meet the old traditional concept of retail, and then on top of that meet the industry recognition test so that the establishment was recognized in its particular industry as a retail end of it. Then the effect of the amendment of 1949 would be to broaden the coverage of the Act and further restrict the application of the exemption.

Now that, we'll show Your Honor quite clearly by legislative history, was not the intent of Congress: The intent of Congress was to broaden the exemption and narrow the coverage of the Act, to expand exemption, not to restrict it. And we have the history of this legislation which we will submit to Your Honor to bear that out.

Now, the—in addition to the legislative history, we have a precedent from the Fifth Circuit Court of Appeals where the Fifth Circuit Court has said in a very good opinion which we'll give to Your Honor that—just what I'm saying to Your Honor—that this is the test that Congress set forth; that they did not leave it to the Administrator to say who was a retail establishment, but left it as a question of fact to be determined in each case by proof as to how the industry regarded that par-

particular establishment. Now, that case is *Boisseau v. Mitchell*, a very recent case in 218 Fed. 2d 734. But that will be referred to often, I think, during this trial. So there we have what we think Congress intended clearly shown by the
 28 legislative history. We do have a precedent to cite to Your Honor from the Fifth Circuit Court of Appeals, and, lastly, we have the facts which will be in the record by the stipulation and by the witnesses that we will produce.

Now, in the Household case, which is the way we have been referring to this Pennsylvania case where the Secretary of Labor brought an injunction suit against the Household Finance Corporation involving the office, local office, at Lancaster, Pennsylvania, this very question that Your Honor is going to try was tried out and much evidence was introduced in that case. That record is now a part of the record in this case so that Your Honor will have the benefit of that testimony as to what is a retail establishment in the financial industry, and, particularly, whether operations of these offices like the defendants operate are considered the retail part of the financial industry. There is much testimony by some very prominent people in this case, including Leon Henderson, the Executive Vice-President of the First National Bank of Chicago, the head of the banking department and Vice-President of Bankers Trust Company of New York, and people of that character. So, the facts, the legislative history, and the Fifth Circuit precedent is what we rely on in this case.

Now, I believe that states the position that we will try to establish. In the Household case in Pennsylvania the—Judge Kirkpatrick, who was the District Judge hearing the case, decided the case for the government on proof. He held for the government on both questions, the commerce question. And then he held that the operations of the Lancaster office of
 29 Household did not come within the exemption statute, but he based it on the ground that the traditional concept of retail still had to be met. In other words, he followed the government's argument that the industry recognition test was not alone sufficient. Now—but on the question of whether the small loan companies, or the consumer finance companies, are recognized in the finance industry as a retail part of it, he found as a fact, under the evidence in that case, which is now in this case, that the—that that was true, that that was a retail end of it, and he said this—I'm quoting now

from Judge Kirkpatrick—"On the whole, and with the qualifications stated, I think that the defendant is entitled to a finding that small loan companies are regarded in the financial industry as retail service establishments." So that was a finding of fact made by Judge Kirkpatrick in the Household case on the record which is now a part of the record in this case, and we will certainly ask Your Honor to make a similar finding, and that is the precedent for that.

I think with that, Your Honor, the point mainly that I'm trying to impress is the difference in the contention of the government and the defendant concerning the meaning of the 1949 amendment of Section 13 (a) (2), our contention being that it's an exclusive test fixed by Congress so that under proof the courts may determine how the industry regards any particular service establishment. The government contention on the other hand, of course, is that it's an added test, that you still have to meet the traditional concept of retail establishment in order to be afforded an exemption.

By the COURT. What proof, Mr. Dawson, do you intend to introduce?

Mr. DAWSON. We have two witnesses, Judge.

By the COURT. For what purpose?

Mr. DAWSON. The first will be to describe the operations of the two companies, get that in the record.

And the second witness will supplement that witness and will give some opinion, or expert testimony, on how these type operations are regarded in the financial industry. Those are the only two witnesses we'll have.

By the COURT. And that's not covered in the stipulation as a part of this record?

Mr. DAWSON. No, sir.

By the COURT. And it's necessary for your case?

Mr. DAWSON. We think it is, Your Honor. Now, if Your Honor please, Mr. Tinker just called to my attention that there is still another supplemental stipulation putting in some figures and facts which we'll agree to, and he asked me to file it, which I'll gladly do.

By the COURT. All right. That will be put in as part of the record.

Mr. DAWSON. That will be a part of the record and considered as evidence?

By the COURT. Yes.

Mr. DAWSON. Thank you.

By the COURT. Mr. Ray—

OPENING STATEMENT ON BEHALF OF PLAINTIFF BY MR. RAY

Mr. RAY. May it please the Court, the plaintiff contends that of course these defendants are not engaged in operating a retail or services establishment within this exemption provision. Our contention is based for one thing on the fact that this establishment is not engaged in making sales of any kind. They are engaged in the business of lending of money which is not, we contend, making sales. And in order to qualify as a retail or service establishment the definition specifically states that the establishment—that seventy-five percent of the sales or services must be either not for resale or—and, rather, recognized as retail in the industry.

31 We further contend that this exemption, this establishment, is not within the, what is sometimes referred to as, the retail concept which appears to be necessary for the applicability of this exemption. And in support of that we expect to refer to the legislative history, particularly of the 1949 amendment, wherein the sponsors of the amendment, the management on the part of the House, and various other legislative evidence in the Cincinnati case for example, that concerns banks, credit companies, insurance companies, et cetera, are not intended to be within the scope of this exemption, but on the contrary it typically refers to such establishments as the corner grocery store as a retail establishment, and an example of service establishments are the barber shop, the clothes pressing—

By the COURT. (Interrupting.) Who would the wholesaler be in lending the money?

Mr. RAY. If Your Honor please, that is a question—

By the COURT. (Interrupting.) I should address that to the—

Mr. RAY. (Continuing.) That I would say is not particularly relevant, because the wholesale-retail concept as such is not really a part of the financial industry. If you are wholesaling money, to me, is something that I wouldn't undertake to describe. And I might say parenthetically that these experts who testified in the Household Finance case in an exhaustive manner—and it will almost exhaust most people to read it, I think—struggled mightily with that problem, and no answer

was forthcoming, at least in my reading of it. And I have the feeling that Judge Kirkpatrick felt somewhat the same way about it after reading his opinion in the case.

Now, in addition to this legislative evidence we would
32 like to call Your Honor's attention to the fact that the U. S. Department of Labor and the Administrator of the Wage and Hour and Public Contracts Divisions has issued his bulletin and interpretation of this statutory provision which is known as Interpretative Bulletin, Part 779, subject being Retail and Service Establishment and Related Exemptions, which the courts—

By the COURT. (Interrupting.) When was that issued?

Mr. RAY. Well, the latest edition, the one I have here and which I'll make available to Your Honor at this time for his perusal—counsel on the other side, I'm sure, are familiar with the bulletin—this issue was in April, 1954, but it's been revised from time to time. This just happened to be the latest edition.

Now, since Your Honor is perhaps not familiar with these kind of cases and the real part that these interpretations play in matters of this kind, I'd like to point out that the courts have indicated that they are entitled to great weight. And I might point out here—I think I might read a reference to what one court has said about how they are to be considered. "We don't say that it's not a matter for the court to decide. This is a matter for the court to decide. All the court can do in regard to these—"

By the COURT. (Interrupting.) Administrative interpretation is entitled to great weight. There's no question about that.

Mr. RAY. Well, I would like to then submit to Your Honor this Bulletin, Part 779, which has in it the statutory provision involved, and this might be very convenient. Without objection on the part of counsel?

By the COURT. Well, we'll file it and make it a part of the record in this case.

33 Mr. RAY. All right. As an exhibit?

By the COURT. Well, exhibit, or by agreement.

Mr. LEVIN. I shouldn't think it would qualify as an exhibit. It was an opinion by the man who brought the other test case. It's rather vital, we say, but the Court is entitled to consider it the way he would consider a brief.

Mr. RAY. Well, it's a matter which the Court can take judicial notice on.

By the COURT. It's issued under the regulations of the Department of Labor.

Mr. LEVIN. It would not be evidence. It would be something for the Court to consider and take judicial notice of, the same as you might a law, or a brief.

By the COURT. Yes; it's an administrative finding. It's a part of the law——

Mr. LEVIN. (Interrupting.) Well, there's this distinction between this regulation—the regulations here and the regulations in some other statutes. It was not intended that the Administrator was to have the final rule. As counsel well stated, the views of the Administrator are entitled to weight, but in this kind of interpretation question where you are interpreting what Congress intended, the Administrator's views are to be considered along with everybody else's views. In fact, the legislative history here shows they say specifically who will determine it. The Administrator will have his views; the industry will express its views through witnesses; and then the court will weigh it all and decide what is the fact regarding recognition in the industry. But I don't think—I have never heard of a case—and I've been in a great many of these—where the regulations were made a piece of evidence. I don't

34 think counsel intended to hand it up as such.

Mr. RAY. We don't insist on it, just whatever is the most convenient way for the Court to construe it. But I would like to restate, if I may, the posture that these bulletins are in. Counsel referred to the fact that the public official charged with the administration of the Act may be a biased person, and so on. I want—I think it should be made clear that the view—for example the Supreme Court in *Skidmore v. Swift*, 323 U. S. 134, made this statement, "The Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case." And, skipping some, "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Now, that's what the Supreme Court said about it, and that's the proper perspective that I think that Your Honor should consider this bulletin in.

By the COURT. All right. Let's have the first witness, gentlemen.

Mr. THOMAS E. RILEY, called as a witness on behalf of the defendants, after first being duly sworn, testified as follows:

Direct examination by Mr. THOMAS S. DAWSON:

Mr. DAWSON. Will you state your name?

Mr. RILEY. Thomas E. Riley.

Q. Where do you live, Mr. Riley?

35 A. Lexington, Kentucky.

Q. What is your occupation?

A. Supervisor, Kentucky Finance and Kentucky Discount Companies.

Q. In that capacity are the operations of these two offices at 235 South Fifth Street directly under your supervision and control?

A. That's true.

Q. And are you familiar with the operations of those two companies at that office?

A. Yes, I am.

Q. Describe the office where these two companies do the business, please?

A. Well, the address, 225 South 5th Street, is located more or less in the heart of Louisville, so situated that we can serve Louisville and the metropolitan area. We are near the retail shopping center so that we can better serve the consumers, the customers that we depend upon.

Q. Now, let's take up the two different companies. First, the Kentucky Finance Corporation; what are its operations?

A. Our business, as far as Kentucky Finance is concerned, is in the making of small loans from twenty to three hundred dollars.

Q. Does that company operate under a license from the state?

A. Yes, we do. We are under a state license, and are supervised by the state.

Q. Which agency of the state supervises and regulates the operation of that company?

A. State Banking Department.

Q. Is there a limit on the loan—limit on the amount of the loans which the company may make?

36. A. There is a limit on the size of a loan, three hundred dollars. There is no limit on the number of loans we make.

Q. Now, do you know, or have you enough information to tell the Court what the average amount of the loans would be that the company has made within the last year?

A. Yes, sir; that is, the average sized loan?

Q. Yes; average sized loan?

A. That will run from two hundred to two and a quarter—slightly over two hundred dollars.

Q. Tell—I believe you said that you are thoroughly familiar with the operations of the company, and I take it that that includes familiarity with the records of the company?

A. Yes, sir.

Q. Do those records show what the money in each case was borrowed for?

A. Yes, they do. One of the questions on our application which affects our credit judgment is why the customer is borrowing the money.

Q. Well, now, tell the Court what the purpose of these loans is, the general—in general, what the people borrow this money for, if you know?

A. Generally speaking, for household needs such as food bills, medical, dental bills, hospital bills, seasonal expenses—such as in September we loan large sums of money, for such things as going back to school expenses, and of course at Christmas, for Christmas expenses; and around Easter time, for clothing. A good percentage is also loaned to pay already existing obligations; that is, consumer obligations, to retail establishments such as grocery stores, furniture stores, and so forth. But generally speaking the money is loaned

37 for consumer purposes and for general household needs.

Q. What class of people does the company loan money to? Just describe them generally.

A. The majority, I would say, is loaned to the laboring class by as much as sixty percent. Broken down further would come next the semiskilled laborer will take up about twenty percent of the borrowers. And then the skilled laborer, a very small percentage. Clerical workers, not more than five or ten percent. And occasionally a professional person, such as a nurse or a teacher. But they are definitely in the minority—not over five percent.

Q. Where are those loans made?

A. The loans are made at our place of business, 225 South 5th.

Q. Always?

A. Always; yes, sir.

Q. Now, let's take up the Kentucky Discount Company. What—what does that company do?

A. We're so organized that we purchase individual installment sales contracts from retailers. In purchasing these contracts our judgment is based upon the credit and the ability to repay of the customer who has signed the contract.

Q. Not the dealer?

A. No, indeed. No. Strictly on the basis of the customer.

Q. Do you purchase these contracts individually? That is, one at a time?

A. Yes, sir.

Q. What credit—whose credit is checked when you buy one of those contracts?

A. The customer's credit.

Q. Well, it covers what? these conditional sales contracts cover, usually?

A. Such commodities as television sets, washers, stoves, refrigerators. We do buy several contracts on bicycles, especially this time of the year. Items which are used in the home would best describe it, I suppose.

Q. And neither company sells or serves—sells goods or services or lends money that's to be passed onto somebody else? There's no—

A. (Interrupting.) No, sir.

Q. (Continuing.) There's no business loans then?

A. No, sir. None at all.

Q. Always to an individual consumer?

A. That's true.

Q. And in the case of Kentucky Discount an individual consumer is always the borrower?

A. Yes, sir.

By the Court. Is there recourse on these loans, Mr. Riley?

A. Yes, sir; on a percentage of the loans. I have some figures which I'd like to refer to on that. No, I don't, I'd have to estimate that. That would—recourse runs about twenty-five percent.

Q. In the case of acquiring one of these conditional sales contracts, is the sale made by the particular dealer involved before you pass on the credit of the individual or not?

A. Not to our knowledge. As far as we are concerned our approval is necessary before he actually completes the sale. If he has already delivered the merchandise, he has done that on his own, and we have no knowledge of it.

Q. Do you always accept all of these contracts that are offered to you by dealers?

A. No, sir. Our reject percentage will run as high as 39 twenty to twenty-five percent.

Q. I believe it's true, Mr. Riley, that once in a great while you might acquire some of these conditional sales contracts in a group of, say ten or twelve. Does that ever happen?

A. That happens. But those contracts are individually investigated and individually approved. The fact that we buy them as a group is incidental.

Q. I see.

A. Actually we are depending upon the individual customer's credit standing and ability to repay us.

Q. In every instance the credit of the consumer is involved in determining whether you buy the contract?

A. Yes, sir.

Q. Now, once you acquire this conditional sales contract, what happens? How is that account treated?

A. Well, once the contract is brought to our office by the dealer, we give the dealer our check for that contract. Immediately it's entered on our books as a separate contract, and an account card is prepared.

Q. In whose name is the account card made?

A. In the name of the customer.

Q. Always?

A. Yes, sir.

Q. All right. Then what happens? Is it handled as one of your accounts, or otherwise?

A. As one of our accounts. We advise the customer by letter that we have purchased the account and that he will make all future payments at our place of business, either in person or by mail. And as payments are made, they are entered on his individual account card.

Q. That's all.

40

Cross-examination by Mr. MARVIN M. TINCHER:

Mr. TINCHER. I've just a very few questions, Mr. Riley. In those instances where the account of your installment sales contract purchaser is carried in his own name, your record will show who the dealer was from whom you bought that contract, will it not?

Mr. RILEY. Yes, sir.

Q. And if it's a recourse type of transaction, you will then look to the dealer in the event that the account becomes uncollectible, is that right?

A. No, sir; that's not accurate. If the account becomes delinquent, we will go to the customer for payment. We will send notices to the customer, serious notices. We'll telephone the customer, and actually go to his house and contact him, numerous times before deciding that the account is absolutely hopeless, and then going to the dealer to exercise his responsibility.

Q. That's what I said. When the account becomes uncollectible, then you turn it back to the dealer and get a refund of the amount that was remaining unpaid, isn't that correct?

A. On a full recourse setup, yes, sir. But, as I mentioned, that is twenty-five percent of our business.

Q. I believe your statement of twenty-five percent was in form of an estimate, wasn't it, Mr. Riley?

A. No, sir. These figures I have were made up recently, and when I said twenty-five percent, I'm speaking of full recourse setup.

Q. Now, you have others that are on a recourse basis where you don't have full recourse?

A. We have what we call a repurchase agreement whereby the dealers contingent liability is limited by the fact that we must actually repossess and return the item to him before he's obligated to pay in full.

Q. How many of your accounts under this category fall in that group?

A. I don't have those figures available. I can get them for you.

Q. I think perhaps we would want to have access to those figures.

Mr. DAWSON. That's all right.

41

Q. Do you have any figures on the number or percentages that are without recourse at all?

A. No, sir. I couldn't even give you an accurate estimate on that. I'd rather get those for you.

Q. Could you say whether it's ten percent or less or more?

A. I would say that it would exceed ten percent. But it's an estimate. I have no basis for that.

Q. Are you currently purchasing these instalment sales contracts on a non-recourse basis?

A. Yes, sir; in some instances. I'd like to clarify why we'll buy some on recourse and some not on recourse.

Q. All right.

A. If that will help the Court understand it. The purpose in recourse, as far as we're concerned, is to prevent any fraudulent conduct on the part of our dealers. We're dealing with— with some of our dealers who are extremely weak financially, and it's possible over a very short period of time for them to forward to us several contracts, individual contracts, amounting to several thousand dollars that have been misrepresented as to terms of sale and are actually not genuine. So, to prevent that from happening, we'll encourage a dealer to sign with recourse. But we cannot, due to the financial condition of the average dealer, depend upon him for repayment on that account. We could never extend credit to the dealer in large amounts that we do to the customer.

Q. If those dealers are engaging in that type of practice, though, that you indicate you want to guard against, do you find that those dealers are financially responsible and recourse against them would be of no value to you?

A. I say that we do not depend upon that recourse. We depend upon the individual credit and ability to repay us.

Q. Now, if I understand your testimony correctly, Mr. Riley, you said that you did not make any business loans or issue any money in any of these transactions which is to be passed on to anyone else, is that what you said?

A. That's true.

Q. Does your experience indicate that the dealers with whom you are transacting business, from whom you buy instalment contracts—instalment sales contracts, are they getting this money in exchange for their instalment sales contract for the purpose of liquidating their expenses?

A. I don't know what they do with their money after we give it to them.

Q.. Well, in your experience with them, don't you know that as a matter of fact they have to liquidate their instalment sales contracts in order to pay the manufacturers, or their suppliers?

A. We purchase the instalment sales contract from the dealer. What he does with the money, I do not know. I imagine it's put into the use in his business for whatever purpose that might be.

Q. That would include paying off the amounts due
43 on merchandise he had sold, wouldn't it?

A. Possibly. I don't know what he does with that money. We're not in that close contact with the dealer. I reviewed our files the other day, and we don't have a current financial statement on any dealer. We don't particularly care what financial shape he's in, because we're not depending upon his recourse.

Q. You do have occasion to resort to that recourse arrangement, do you not, and turn back the uncollectible accounts?

A. Yes; we do. But it's the exception when we do. A very small percentage.

Q. And in addition to those, you sometimes repossess articles of furniture that secured these instalment sales contracts?

A. Yes, sir.

Q. And turn that back to the dealer?

A. Yes, sir.

Q. And in turn he pays you the amount remaining on the account?

A. Yes, sir.

Q. That's all.

Redirect Examination by Mr. THOMAS S. DAWSON:

Mr. DAWSON. Mr. Riley, will you please go back to the method of acquiring these contracts. I believe you testified on direct examination that the dealer would usually call the office there at 235—5th Street to find out if the credit of the individual about to make a purchase would be acceptable, is that the way it is handled?

Mr. RILEY. That's true. On every contract, it's phoned in to us, the application is phoned in to us. The girl calls
44 as many creditors as the dealer gives her, direct, to determine credit experience, the person's pay record.

After she has done that, she will call the credit bureau and actually determine the man's job to determine his ability to repay us before we call the dealer back and tell him that we'll purchase that individual contract.

Q. Now, on the few occasions that more than one contract is purchased at a time, how—how—how is that handled?

A. When—if a dealer advises us he has a number of contracts which he would like to sell, we will examine the individual contracts and hand pick them as to their credit records and ability to repay.

Q. Rejecting the ones that you won't pass credit on?

A. Yes, sir. Any contract there that haven't paid him for several months or have moved out of the state, we don't want, because they would be too much trouble to collect.

Q. Now, do you have any figures available to show how much of the total, or what percentage of the total of the contracts purchased would be acquired in this method of buying several at one time?

A. Yes, sir.

Q. All right. Will you give us those figures, please?

A. From January of '53 through November '30th, we had only purchased a total of \$17,281—pardon me—

Q. (Interrupting.) During that same period, what did the total contracts purchased amount to?

A. Well, I was wrong on that \$17,000 figure. That should be \$29,046. The total was \$519,086. The percentage was four point nine percent of the entire amount of the purchases.

Q. Can you tell from your records how many occasions
45 —how many different occasions these contracts were purchased in groups that way?

A. On three different occasions.

Q. Three different occasions?

A. Yes, sir.

Q. What is the percentage of the discount business to the total amount of business done in the office? That is, both companies, everything?

A. As I recall—

Q. (Interrupting.) Roughly.

A. (Continuing.) That was approximately forty-nine percent. Now, no, I beg your pardon. It was slightly over forty percent, about. A little less than sixty percent is small loans.

Q. That's volume you're talking about?

A. We're speaking of volume; yes, sir.

Q. Dollar volume?

A. Yes, sir.

Q. That's all. Wait just a minute. So, when you say that when the book purchases of these contracts on these three occasions since January 1953 amounted to four point nine percent of the volume, dollar volume of the Kentucky Discount Company, actually that would be something like two percent of the total volume of business done in this particular office, is that correct?

A. That is correct. Yes, sir.

Q. That's all.

Re-cross-examination by Mr. MARVIN M. TINCHER:

Mr. TINCHER. I'm not sure I understood those figures, Mr. Riley. The four point nine percent related to group purchases of instalment sales contracts?

46 Mr. RILEY. Yes, sir; since January of '53, we have purchased \$591,086 in contracts, individual contracts, from dealers. Of that total we purchased in bulk, as we call it, a total of \$29,046. This \$29,000 is four point nine percent of the total of \$591,086. And the \$29,000 was broken down into three smaller purchases.

Q. Then did I understand that you broke that four point nine percent down further for Mr. Dawson on the basis of your discount business being only roughly forty percent in volume of the total business?

A. If we include this \$591,086 the total amount purchased with the total amount of loans made, the small loan volume, we'll come up with a percentage figure of around two percent.

Q. That would be on the total business done by the two corporations, the two defendants?

A. Yes, sir.

Q. But with reference to the discount business it still remains four point nine percent?

A. Yes, sir; that's true.

Q. And something slightly in excess of forty percent of the total volume of business is purchases of instalment sales contracts, is that right?

A. No, sir. Our total outstanding in small loans as compared to our discount, the percentage to the total of both in small loans was fifty-nine percent as compared to a little over forty percent in discount.

Q. That's the total amount of business outstanding as of the present time?

A. That's true, as of November 30th.

Q. Now, what relation do the number of accounts bear?

A. I don't have those.

Q. Between discount and small loan business.

47 A. I don't have those figures available. But I can get them for you.

Q. Back for just a moment, Mr. Riley, to your purchases on a recourse and on a no-recourse basis. Is there any difference in the rate at which you discount those instalment sales contracts, whether you get a recourse against the dealer?

A. No, sir. We have several rate charts which we use. We have several plans for the dealers. Normally, if we—a dealer wants to do business with us, we'll try to get him to sign with recourse. If we are unable to, but still want his business, due to the competition in this area, we're forced to purchase it without recourse. But since we are not dependent upon the recourse in the beginning, why it doesn't affect the rate any at all. We're just fortunate that we do have some signing with recourse, which gives us added assurance that they're not going to misrepresent any contracts.

Q. The financial status, or standing, of the dealer would have a great deal to do, would it not, with whether you would accept the instalment sales contracts on a recourse or nonrecourse basis?

A. It would have very little to do with it.

Q. Would that have anything to do with the rate at which you discount his paper?

A. No, sir. If I can clarify that, due to the competition in this area for loan business, and we buy these contracts only because they are on customers that will, we hope, eventually be good small loan customers for us, we're after that type of business, those contracts from the dealers, as is our competition, and we're forced to give all dealers the lowest rate possible and with or without recourse. It doesn't make much difference as far as we are concerned.

48 Q. What is the rate at which you discount that paper, Mr. Riley?

A. The average will be approximately eleven percent.

Q. And how far below that and how far above that?

A. It wouldn't go under ten, and to the best of my knowledge, it doesn't go over twelve.

Q. All right. You testified to some extent about your conditional sales contracts. I offer you here a form which is headed "Kentucky Conditional Sales Contract." Is that the type of contract that your dealers have executed with their purchasers on the papers that you buy from the dealers?

A. Yes, sir.

Q. And does Kentucky Discount furnish those forms to the dealers with whom you rely for business?

A. Yes, sir.

OFFERS IN EVIDENCE

Q. I'd like to offer this form in evidence as Plaintiff's Exhibit No. 1.

Mr. DAWSON. No objection.

(Document received and marked by the Reporter as "Plaintiff's Exhibit No. 1.")

Q. You also spoke, Mr. Riley, of the borrower stating the purpose for which he wanted the loan. Is the form on which his purpose is expressed completed at the time his loan application is taken?

A. No, sir. Do you want me to tell you what that is?

Q. Yes, if you would, explain this?

A. That is a financial statement on which he lists his current obligations so that we can determine whether or not he has the ability to repay, if we extend him further credit. That form is used strictly on small loans and not on discounts.

49 All right. I'd like to have this identified as Plaintiff's Exhibit Number 2 and offered in evidence.

Mr. DAWSON. No objection.

(Document received and marked by the Reporter as "Plaintiff's Exhibit No. 2.")

Q. I have here "Kentucky Combined Loan Forms" and I believe on this sheet of paper somewhere the purpose of the loan is stated, is that correct, or are you familiar with that form?

A. No, sir; it wouldn't be stated here, on the note or the mortgage. However on the back of the account card there is a place for purpose, and we get this information from the application. And it's on the application that the person placed it in the beginning.

Q. And then it would be transferred to this ledger card?

A. Yes, sir.

Q. I'd like to have this identified as Plaintiff's Exhibit Number 3, and offer this in evidence, Your Honor.

Mr. DAWSON. No objection.

(Document received and marked by the Reporter as "Plaintiff's Exhibit No. 3.")

Q. Mr. Riley, it's been stipulated that Kentucky Finance Company in making loans to borrowers also arranges for protective life insurance in something like eighty-five percent of the loans. I show you here a form which is "Insurance Application Form" with four copies of that. Is that the application form that is used?

A. Yes, sir. It is.

Q. I'd like to have this identified as Plaintiff's Exhibit Number 4 and offer that in evidence, Your Honor.

50 (Document received and marked by the Reporter as "Plaintiff's Exhibit No. 4.")

Q. Now, is it true, Mr. Riley, that in connection with these sales of insurance policies that Kentucky Finance Company makes a report at the end of the day of how many insurance policies and the amounts has been sold in connection with loans?

A. That—that was the policy. I believe that has been changed, and I believe that's being made monthly at the present time.

Q. The—the report—well, is it true that up until quite recently those insurance premiums and report of the number of policies and the amounts and so forth were made on a day to day basis?

A. Yes, sir.

Q. And is this the form on which those were reported?

A. Yes, sir; it is.

Q. I'd like to have this form which is "Report and Remittance to The Credit Life Insurance Company, Springfield 3, Ohio," marked for identification as Plaintiff's Exhibit Number 5 and offer this in evidence.

(Document received and marked by the Reporter as "Plaintiff's Exhibit No. 5.")

A. I didn't mean to imply that was sent to Springfield now, even though the address is Springfield. That's sent to an agency in Lexington.

Q. That is The Central Insurance Agency in Lexington, Kentucky?

A. That's right.

Q. Thereafter the premiums and the insurance applications go to Credit Life Insurance Company in Springfield.
51 Ohio, do they not?

A. I have no knowledge of the operation of The Central Insurance Agency. We do business with Central Insurance Agency, and that's where we send our reports and the application.

Q. The second copy of this insurance application form, which is Plaintiff's Exhibit No. 4, has a notation, "Mail this copy to The Credit Life Insurance Company, 120 South Limestone Street, Springfield, Ohio," is that right?

A. I would imagine those instructions applied to the agency and not to us, because we don't send anything to Springfield.

Q. Do you see the insurance policies after they have been issued, Mr. Riley?

A. Yes; I do.

Q. Are they—is the insurer, as shown in those policies, the Credit Life Insurance Company, Springfield, Ohio?

A. That's true.

Q. You also testified about sending a letter to the customer, whose instalment sales contracts that your company has purchased. Is that a copy of the form letter that is used for that purpose? [Hands document to witness.]

A. Yes, sir.

Q. I'd like to have this form letter identified as Plaintiff's Exhibit Number 6 and offer it in evidence.

Mr. DAWSON. No objection to that.

(Document received and marked by the reporter as "Plaintiff's Exhibit No. 6.")

Q. Mr. Riley, you spoke of the competition which your companies faces in the small loan business here in Louisville.

52 What types of establishments make up that competition?

A. Other small loan companies, and other companies interested in purchasing instalment sales contracts.

Q. Now, both types of business, do you find that the local banks also are in competition with your companies?

A. No, sir, not in the manner that we do business.

Q. Well, whether or not they follow the same procedure, is

it true that they are engaged in buying instalment sales contracts from various dealers?

A. I'm not familiar with the banking operation. I'm not familiar with bank papers. It's my understanding that when a bank does business with a dealer he's relying upon the credit and the financial worth of the dealer, whereas we are serving, if we serve at all, the customer—I don't mean if we serve at all—we're serving customers who are doing business with dealers, who are in most cases unable to obtain bank credit.

Q. But you say you are not familiar with the basis on which the banks would purchase discount papers, is that correct?

A. I am familiar only to the extent of what I have said.

Q. Then any understanding that you have with which you testified in that regard is limited by your lack of familiarity with the basis on which they operate?

A. Yes, sir, except what I've already said.

Q. And—well, to be a little more specific, isn't it true for example that the Household Sewing Machine Company, which is one of the dealers with whom you regularly do business, that they finance a good percentage of their sales, and sell their instalment sales contracts, to one or more of the local banks in Louisville?

53 A. Not to my knowledge.

Q. You don't know about that?

A. I don't answer that, no, sir.

Q. Now, isn't it true also that the banks in Louisville are engaged in making small loans in amounts of twenty dollars to three hundred dollars to individuals?

A. Yes, sir.

Q. That's all.

Redirect Examination by Mr. THOMAS S. DAWSON:

Mr. DAWSON. Do you know whether or not any of these banks are licensed under the Small Loan Law and are limited to loans up to three hundred dollars?

Mr. RILEY. No, sir. To the best of my knowledge they are not operating under a Small Loan Law, and they are not serving the same class of people that small loan companies are serving. We are serving that class of people that cannot get credit at a bank.

Q. Now, about this insurance, Mr. Riley, that the government has questioned you about at length. Neither one of these companies is in the insurance business at all, is it?

A. No, sir.

Q. Who is the beneficiary on each one of these policies that's issued?

A. The first beneficiary is Kentucky Finance Company, and, secondly, the estate of the customer.

Q. What is the purpose of the insurance?

A. The only reason we make that available is for—it affords us additional collateral, additional surety, against the death of the individual customer.

Q. Is the insurance a necessity? Is it a requirement?

A. No, sir. As a matter of fact, the Small Loan Law forbids us to make any such requirement.

54 Q. Is there any profit to Kentucky Finance or the Kentucky Discount Company to any extent from the premiums on these insurance policies?

A. No, sir.

Q. That's all. Oh, if I understand you then, it's just a service which you would like for the borrower to avail himself of, but it's not a requirement?

A. That's true. As a matter of fact, we repeatedly have borrowers requesting that service.

Q. And of course it's for the mutual benefit of the lender and the borrower?

A. Yes, sir.

Q. Do the accounts purchased, the contract indebtedness purchased by Kentucky Discount Company carry insurance to any extent?

A. Not over one percent.

Q. That's all.

. Re-cross-examination by Mr. MARVIN M. TINCER.

Mr. TINCER. With regard to those insurance policies, Mr. Riley. As I understand it, an employee of Kentucky Finance Company takes the application for the insurance policy at the time the loan is made——

A. (Interrupting.) Yes, sir.

Q. (Continuing.) Is that right?

A. Yes.

Q. And also at that time collects the premium in advance from the borrower?

A. Yes, sir.

Q. And then that insurance application and the premium are transmitted by Kentucky Finance Company to the agency in Lexington?

A. Yes, sir.

55 Q. That's all. One more question. When does that insurance policy become effective?

A. The day of the loan, on the date of the loan.

Q. All right.

By the COURT. Any further questions?

Q. That would be prior to the transmission of the premium to Lexington?

A. Yes, sir.

Q. That's all.

Redirect Examination by Mr. THOMAS S. DAWSON:

Mr. DAWSON. You have an arrangement to that effect with the agency

Mr. RILEY. Yes, sir.

Q. As to the effective date of the policy?

A. Yes, sir.

Q. A special arrangement?

A. Yes, sir.

Q. All right.

By the COURT: All right. Next witness, please.

(Witness excused.)

Mr. DAWSON. If Your Honor please, at this time I would like to hand up to the Court a carbon memorandum which we have prepared which Your Honor can probably get some benefit of in following the course of the trial. The government has a copy of it. Does the government have a carbon memorandum that they are going to use that they would like to introduce at this time?

Mr. RAY. The proposed findings, that's all.

56 Doctor MORRIS NEIFELD, called as a witness on behalf of the defendants, after first being duly sworn, testified as follows:

Direct examination by Mr. THOMAS S. DAWSON:

Mr. DAWSON. Please state your name.

Doctor NEIFELD. Morris R. Neifeld.

Q. What is your profession, Doctor Neifeld?

A. I am an economist.

Q. What—are you presently connected in any capacity with any company or corporation?

A. I am.

Q. What company or corporation is that?

A. Beneficial Management Corporation.

Q. In what capacity are you connected with that company?

A. I'm Vice-President and economist, and a member of the board of directors of that corporation.

Q. Doctor, what is your educational background, what degrees do you hold?

A. I have an A. B. from Cornell University, M. A. from Columbia, and Ph. D. from New York University.

Q. Have you ever been connected with any university or other institutions in the capacity of a teacher or professor?

A. I am Adjunct Professor at Rutgers. And back in 1940 and '41 I gave the first course in Consumer Credit ever given at any university in the United States.

Q. Where was that? At Rutgers?

A. Rutgers University, School of Business.

Q. In addition to your teaching have you lectured at other universities?

A. I have.

57 Q. Would you name some of the universities that you have lectured at?

A. Pennsylvania, Columbia, Southern California, Washington University on the Coast, Minnesota University, Indiana University, Lehigh University, and dozens of others.

Q. What subjects did your lectures include?

A. My field generally is Consumer Credit in the United States, and with special emphasis of small loan companies and consumer finance companies. Those are all names for finance companies.

Q. How long have you been connected with the Beneficial Management Company?

A. Since August, 1926.

Q. Just tell the Court what the Beneficial Management Company is, what kind of an operation is that?

A. The Beneficial Management Corporation is a nerve center for the operations of a chain of multi-unit small loan companies. These small loan companies are all individually incorporated within the particular states. Any office we have here in Kentucky would be a Kentucky corporation. Those operating subsidiaries are wholly owned by the parent company, the Beneficial Finance Company, which is a—the organ-

ization that's listed on the stock exchange. It's the organization which raises the money for all these operating subsidiaries. The Beneficial Management Corporation lays down the policies and training schedules and advertising and accounting and all the regulations under which the operating companies, operate.

Q. Then if I understand you, it's exactly what the name implies; it's the management of the Beneficial Finance Company?

A. And it performs that service without profit.
58 Whatever expenses are involved in the operation are prorated among all the offices in the operating subsidiaries.

Q. How many different companies—or, I'll put it this way—how many different small loan offices are operated under this management while you are part of?

A. The latest figure is nine hundred seventy-two.

Q. How many states do you operate in?

A. Forty-four states, all the provinces of Canada, and in Hawaii.

Q. Prior to the time you became connected with Beneficial did your activities, or then occupation, include anything connected with the finance industry, or the consumer credit field?

A. No, sir.

Q. What was your occupation or experience or activity prior to 1926 then?

A. I did an investigation for The Great Atlantic and Pacific Tea Company that took quite a bit of time, as a consultant economist.

Q. Have you ever published any books or articles?

A. In the field of consumer credit?

Q. In any field?

A. Yes, I have.

Q. Would you state, tell the Court, give the Court the names of some of the publications?

A. Well, in this field I have published The Personal Finance Business back in 1933; Cooperative Consumer Credit in 1936; Personal Finance Comes of Age in 1939; Neifeld Guide to Instalment Computations; The Mathematics of Consumer Credit, in 1952, I think it was; and the latest one is Trends in Consumer Credit in 1954. And besides that there have
59 been many articles in various journals and trade organizations and university publications.

Q. Just tell us roughly how many?

A. Oh, I'd—it would run into the hundreds.

Q. I wish you would tell us a little bit more about your practical experience in the field of economy, in particular, with reference to the finance business. Have you served on any committees incident to the government regulation of any part of the finance industry, and things of that sort?

A. Yes. Back in 1941 when Regulation W was promulgated—

Q. (Interrupting.) What is Regulation W? Let's get in the record just what Regulation W is.

A. Regulation W?

Q. Its purpose, too, please, Doctor.

A. It was a wartime measure to divert demand for scarce metals from production for civilian uses and free them for production for war purposes. At the same—at the same time, there was another purpose, and that was to avoid the inflation that usually comes during a war period, help avoid the inflation that usually comes during a war period; and the third purpose was to build up a backlog of purchasing power in the hands of the consumer so that when the converse came after the war back to civilian production the civilians—consumers would have money with which to purchase goods and so on that would be coming back on the market.

Q. If I understand you then its purpose was to restrict consumer credit in order to restrict the purchase of the manufacture of consumer appliances?

A. In a time of scarce supply of materials and so on, yes.

Q. Now, in—what connection did you have with
60 Regulation W? Tell the Court what experience you had in that field at that time?

A. I was a member of a committee of three representing the National Association of Small Loan Companies on the problem of consumer credit with the Federal Reserve Board. That committee went to the first general meeting that the Federal Reserve Board called of all phases of consumer credit representatives, and at the time of which the purpose of the regulation and the method by which it would be applied was described by the Federal Reserve Board people. And after that the committee kept in touch from time to time by visits with the Federal Reserve Board, with the governors of the Federal Reserve Board, and with the technicians who had charge of

compiling the figures, and statisticians, and so on. That committee remained in existence during the period which that type of activity was important.

Q. Doctor, at the risk of you saving immodesty, I wish you would tell the Court whether or not you are recognized as the foremost economist in the field of consumer finance?

A. Well, I have been referred to it in that way.

Q. Thank you. Thank you very much. Now, in connection with your profession have you had contacts with the executives of such other institutions in the financial field such as banks, insurance companies, and so forth?

A. I've had wide contact personally, by correspondence, and in all ways. I supplement those contacts by attending the annual trade—trade association meetings of the various groups. The American Banking Association will meet once a year—

Q. (Interrupting.) Have you had occasion to address some of these associations?

61 A. I have.

By the COURT. Mr. Dawson, excuse the interruption, but at this time I think we might be—the qualification, I presume, of the Doctor having been completed, we'll take a short recess.

Mr. Crier, will you recess Court for fifteen minutes?

(Whereupon, a short recess was taken.)

By the COURT. Gentlemen, let's move along as rapidly as we can.

(Mr. Dawson continuing direct examination of Doctor Neifeld.)

Q. Doctor Neifeld, in your capacity as part of the management of Beneficial—management company, have you had occasion to visit and study the operations of small loan offices throughout this country?

A. I have.

Q. Many of them?

A. Hundreds and hundreds of them.

Q. I believe you have said that that company operates some nine hundred—

A. (Interrupting.) Nine-seventy-two.

Q. (Continuing.) Nine hundred seventy-two different offices?

A. (Nods head affirmatively.)

Q. Have you visited the office operated by these two defendants in this case?

A. I have.

Q. Is it similar to the other offices of consumer finance companies that you have seen and studied elsewhere?

A. It is.

Q. Is the operations, or, are the operations substantially the same?

A. They are. The procedure and operations are pretty well standardized throughout the small loan industry.

Q. And I believe that is because there's more or less a uniform small loan law?

A. Yes, the laws are regulatory and supervisory.

Q. Have you read the stipulations which have been made a part of the record in evidence in this case?

A. I have.

Q. Have you read the record and studied the exhibits in the Pennsylvania case of Mitchell v. Household Finance Corporation?

A. I have.

Q. Which are also a part of the record in this case?

A. (Nods head affirmatively.)

Q. You were present here in the courtroom this morning and heard the testimony of Mr. Riley—

A. (Interrupting.) I was; yes, sir.

Q. (Continuing.) Who is an employee of the two defendant companies?

A. (Nods head affirmatively.)

Q. Doctor, I'll ask you if based on the stipulations that you have read, the testimony that you have heard, the records and exhibits in the Household Finance case, your visit to the small loan office of the defendants at 235 South Fifth Street in Louisville, Kentucky, your experience as an economist in the consumer finance field, and as an officer of the Beneficial Management Corporation, your contacts, discussions, correspondence with bankers, investment bankers, insurance people, and other persons in the financial field, and particularly the consumer credit field, can you state whether the operations such as the defendants have here are a part of a larger industry, and if so, what industry?

A. Yes.

Q. Now, you know—you know that?

A. I do.

Q. And what is the industry of which such operations are a part?

A. The general term is the financial industry.

Q. Based on that same information, evidence and records, experience, and so on and so forth, can you tell the Court whether within that industry—that is, the financial industry—there is a concept of wholesaling and retailing?

A. Yes, sir.

Q. Is there such a concept?

A. There is.

Q. Now, to which category do the offices operated by the defendants here belong?

A. Retail category.

Q. And would you say that the small office here that is operated by these two defendants is a part of the financial industry?

A. Yes.

Q. Now, how is that operation, or operation like that, recognized by the finance industry and the people associated in it and in the industry? How is it recognized in the industry?

A. As a retail operation.

Q. Is it recognized as a retail service establishment?

A. Yes.

Q. Can you tell the Court whether or not its activities are considered retail services?

A. Yes.

Q. And that is in the—

A. (Interrupting.) In the industry.

64 Q. (Continuing.) In the industry, and the operations are a part of that industry?

A. That's right.

Q. Now, will you give us the component parts of the finance industry?

A. Well, it includes commercial banks, investment bankers, factoring companies, industrial banks, industrial loan companies, credit unions, pawn brokers, small loan companies, and if I may add, loan sharks, and similar groups.

Q. Now, give us some examples of wholesalers and retailers in the finance industry?

A. Did I include insurance companies?

Q. I'm not certain, but you may include it now if you wish.

A. I meant to. Well, insurance companies is a wholesaler. The company I'm with borrows large sums of money, money running up into many millions of dollars, on long term contracts with insurance companies. The insurance companies lend to many of the companies in the small loan field in the same way. Commercial banks are wholesalers to the extent that they lend money to business, for business operations. Investment bankers are definitely wholesalers. Factoring companies who lend money on the receivables or on the inventory of manufacturing companies are wholesalers. And there are others, of course.

Mr. RAY. May it please the Court—if you will excuse me one moment—in order that the record may be clear, we wish to interpose an objection to this line of testimony on the grounds that it's not relevant or material to the issues in this case, and on the further ground that it's largely repetitions of the testimony which is already before the Court, or at least I understand will be placed before the Court, in the Household record, particularly, the various categories, and all these expressions of opinion. And it's not the kind of thing that could be too helpful to the Court. At least the Court can decide this for itself in resolving this question. And, finally, there is conclusions of law given by this witness as to whether or not certain set of facts constitute the legal situation which Your Honor must himself decide in this case.

By the COURT. Well, he's testifying as an expert. I'm going to permit him to testify.

Mr. RAY. We want the record to show that we are objecting to this in the ground of relevancy, materiality, and competency.

By the COURT. All right. Objection will be overruled.

Q. I'm sorry, Mr. Reporter, will you read the last question? I think he started to answer it.

(Whereupon Mr. Dawson's question appearing ten lines up from the bottom of page 65 was read by the Reporter.)

Q. All right. Now, Doctor, will you give us some examples of retailers in the financial industry?

A. Well, the credit union and personal finance companies, small loan companies, and industrial loan companies, and banks to the extent that they have—make loans direct to the consumer, either in an organized special department or sometimes in smaller banks, without any special department.

Q. Do you mean that some banks or financial institutions do both wholesale and retail lending?

A. Yes.

Q. And some banks do have personal loan departments?

66 A. Yes.

Q. Then if I understand you, banks may to some extent engage in lending money at retail to the ultimate consumer?

A. Restate that question, please.

Q. If I understood you correctly, you said that some banks, if they have a personal loan department, may engage in the lending of money at retail to the ultimate consumer, is that your testimony?

A. That's right. That's my point.

Q. Do insurance companies do both?

A. Well, they are predominantly of course wholesalers, but they may make direct to consumer loans, on the cash surrender value of the policies in those instances. And that is retail consumer transactions.

Q. Where would you place the operations of the Kentucky Discount?

A. It's still in the retail business, because it is dealing, as Mr. Riley said this morning, on the basis of the individual consumer. You have a credit involved, with a direct loan of cash or financing operations, and their picking up and buying of these individual notes or agreements, we call them contracts, on the basis of the individual.

Q. On the basis of the credit of each individual.

A. Of the credit of each individual consumer.

Q. Tell us, Doctor, what the factors are which determine whether financing is wholesale or retail?

A. In the case of—in the finance industry, the factors would be that you are dealing with the ultimate consumer at the end process by making him a loan for the purpose for—for consumption purposes, something that's used up and can't

67 be re—re-used. Usually, there—the amount involved is relatively small. Also—but they loom big in the budget of the consumer, and therefore they have to work out some kind of repayment arrangement that fits in with his budget, and that means that the repayments are generally spread over an instalment basis over a number of months in the case of the

small loan part. And that may run up to eighteen or twenty months. That of course increases the costs of the operation. You have got these eighteen or twenty recordings to make. You've got to record it in your ledger card. You've got to record it in his pass book that each licensee is required to give the borrower. And you've got to—no—you've got to—and keep check on them so that if he goes slow and what not you try to straighten him out, and sometimes that means bringing him him, and even though he has not completely paid off the present loan, but he's in some difficulty, you very often lend him some more money and renew the contract to fit in with his budget.

Q. Would the purpose—

A. (Interrupting.) And there's one other purpose that is very important. Wholesale loans are made for people who put the money to work in industry or commerce, and out of that working will come the profits that pay off the loan. In the case of the individual consumer, the money is put for the use of the family, pay off other debts, and what not, and the consumer has to earn his money at something else, get it in the way of wages or salaries. The money itself does not generate income.

Q. In other words, the money in the case of a retail loan is not used for productive purposes?

A. The distinction is that it's used for consumptive purposes.

Q. I see. I believe you stated, of course, that one
68 distinction, one of the purposes of the loan, that is whether it's for business transactions, or whether it's for the use of the ultimate consumer—

A. (Interrupting.) Yes.

Q. (Continuing.) And not the—

A. (Interrupting.) May I say something about those purposes?

Q. Yes. I'd like for you to discuss that, if you will, Doctor?

A. This consumer finance business is relatively new. The first law that was enacted goes back only to about 1914 or '15, and it had to be enacted state by state. And there was no information, no real worthwhile statistical information, around. And you can understand that the legislatures had trouble with the—legislators had trouble with the size of the price that has to be paid for this retail service. This business, you have a higher cost of doing business, and therefore the price has to be

higher, somewhat as to any retail store. And every time there was an attempt to add another state in the category of permitting this type of business, there wasn't any real information. So way back in the 1930's I got the bright idea, let's work up some kind of a form that the state departments can require from every licensee under oath and summarizing the year's operation, and then the State Banking Department could then consolidate all these licensees in the state and publish a consolidated annual report. And that's being done widely. Now, because the business was so little understood, I put in, in that report, what we call the social statistics section, the idea being that, let's get some information on who are these people and why do they borrow, are they for unsound purposes or are they for sound, constructive purposes. And so in this

69 report as required there is a requirement to show what the purposes are for.

Q. And what are those purposes, generally speaking, Doctor?

A. Well, they—the average individual often get himself overloaded for reasons, either within his control or without his control. If, for example, an illness strikes a family, or somebody has to have an operation, or somebody dies suddenly, or what not, very often the individual doesn't have money to meet the bulk expenditure required, and so a lot of the loans are made for those emergency types of purposes. Very often there may be temporary unemployment which throws the budget out of line for awhile. And often when the individual consumer has gone about and built up a number of debts to various people and gets a little bit slow he may be harassed by individual creditors, by a number of them at one time, and even if he isn't actually harassed he feels that he might be harassed, and so he has that psychological pressure. And one of the big functions of the loan companies is to consolidate all those debts and help him pay off all those creditors so he has only one creditor to look to. And as part of the service of these organizations, they'll make out checks at his direction to the individual creditors and see that he mails them to the—these creditors.

Q. Doctor, what type persons borrow money at these consumer finance offices?

A. Well, of course, you can cut out the very wealthy. But you'd be surprised sometimes at the income of some of the people who do borrow from these small loan companies. I mean, incomes running up to fifteen and twenty thousand dollars a year. But those are the exceptions.

Q. Generally speaking?

70

A. Generally speaking they are a reflection of the occupational distribution in the community at large. Oh, it may run seventy percent of the borrowers are skilled and semi-skilled workers, and so on. Well, you find that that will more or less correspond kinda roughly to the distribution of skilled and unskilled workers in the community. And then you have the white collar workers, sales people and clerks, and a sprinkling of professional people like doctors and dentists, a sprinkling of school teachers, and so on, up and down the line. Of course, there's a group of people whose income is so low that they cannot qualify for a commercial loan. They are the unfortunate people who have to be handled by social agencies, supported by the state or the nation. It might be a widow whose husband died when she had a brood of young children. She has no income, or income insufficient to handle her case, so she is properly a charge on the community. And one of the services of these companies, and that is one, is to direct such people to the social agency that might help them. In that connection too an applicant might come in and say, "I'd like three hundred dollars." "For what purpose?" "Well, to pay bills, and so on." And the manager of the office has to make an analysis of the situation. The borrower doesn't bring in a balance sheet or any financial income or expense statement like a business man takes to the bank that's made up by his accountant. The manager has to work it out and work out something that will fit within the budget of the family without hurting the standard of living. And he may say, "Well, you don't need that much money." Or, he'll say, "You asked for two hundred and you need three hundred," and so on.

Q. Doctor Neifeld, you have a vast experience in the
71 consumer credit field. In your opinion do these companies engaged in that business render a service to these people that you have been talking about?

A. Yes, they do.

Q. Now, will you describe that service and state why you think it's a service?

A. Well, I've already indicated some of it.

Q. I know you have.

A. These people come to you very often with a confused frame of mind and under pressure, psychological and otherwise. You consolidate—you help them determine what their actual financial situation is.

Q. Well, now is it also true, Doctor, that the vast majority of the borrowers from these companies we have talked about don't have credit available elsewhere? In other words, what I'm getting at, they serve a class of people who would not otherwise have credit available so they could borrow money?

A. Yes, with this little qualification if I may make it. There are some individuals who could borrow say in the personal loan department of a bank as well as the small loan company.

Q. Some of them?

A. There are some. Now, they get the loan at a cheaper price in the bank than they will at the small loan companies. They are getting something else besides the mere purchasing power of the dollar. They are getting some of these services—

Q. (Interrupting.) Yes; I understand, but the lending of the money itself is a service, isn't it, in your opinion?

A. Yes; correct.

Q. Doctor, Judge Brooks asked while ago for an illustration of wholesale financial transactions. Can you give the Court an example?

A. Well, you take a factoring organization that lends money on commercial receivables of a company, or on their inventory, or a warehouse loan on merchandise in a warehouse—

Q. (Interrupting.) Well, take—take your own company. Can you state the financial transactions from your company from the top to the bottom and classify them as wholesale and retail?

A. We are almost entirely retail.

Q. You borrow money, don't you?

A. Yes, we borrow money from insurance companies. We borrow on long term loans. We borrow money from trust funds and pension funds on long term from banks. We borrow money for short periods.

Q. How would you describe or classify the loans which your bank or insurance company makes to the Household Finance—I mean, the Beneficial Finance Company?

A. Well, that's a wholesale loan, because they have made it to the company which in turn re-lends it to individual consumers.

Q. And they make that money productive, is that right?

A. The—

Q. (Interrupting.) Your company makes that productive?

A. Oh, yes; our company by having conveniently located offices, like this company here, all over the country puts it out in loans, and therefore we get a profit on the lending of the money and servicing and everything else.

Q. And then when the various offices of your company lend the money to the individual consumer, what
73 would you classify that transaction as?

A. Well, that's purely retail.

Q. Purely retail. How about Household Finance Company?

A. Well, it's practically no difference between Household Finance and Beneficial, or any other company in the business.

Q. Where do these consumer finance companies generally get their money?

A. Where do they generally get it? Well, we have a lot of equity capital that comes from the original investor in the form of common stock issued. These corporate financial setups change. Sometimes we have preferred stock and sometimes——

Q. (Interrupting.) Well, let's take Household Finance. If you know, tell the Court whether or not the Household Finance Company engages in the same type transactions that your company does? That is, borrowing money from banks, First National Bank, for instance, in Chicago——

A. (Interrupting.) And insurance companies, and all these other wholesalers I have mentioned; yes.

Q. So could you say, Doctor, that your company and, say, the Household Finance Company, and other companies that you may be familiar with, borrow money at wholesale and lend it at retail?

A. Yes.

Q. Would that be an accurate description?

A. That would.

Q. Doctor, you have already testified that the terms wholesale and retail are generally used in the financial industry and used for the purpose of describing financial transactions within that industry?

74 A. That's right.

Q. You have already said that, I believe, is that correct?

A. That's right.

Q. Is the use of those terms in that industry something of

recent years, or has—has the industry generally used those terms in relation to its transactions for several years, many years?

A. Oh, many years.

Q. Is there anything new or unusual about the use of the terms wholesale and retail in connection with the—with financial transactions?

A. There isn't.

Q. Have you yourself been writing on the subject of finance for many years?

A. I have.

Q. Do bankers and investment bankers, insurance people, and other people in that type business use those terms universally in describing transactions that they engage in?

A. Yes, sir; in all their conversations and speeches before groups.

Q. You say you hear it in references and speeches?

A. In speeches and talks and what not.

Q. Do you find references to those terms in the writings in the financial field?

A. Yes, the—there are references. I made the distinction myself in one of my early books. I think it was my first book.

Q. Do the writers in that field make use of those terms to describe what they are talking about and describe particular transactions?

75 A. Yes. There isn't much controversies in the field. There isn't an issue. Everybody takes it for granted that there is retail lending and wholesale lending.

Q. In other words, you are saying to the Court that it's universally recognized in the finance industry that there are wholesale and retail transactions?

A. Yes.

Q. And such transactions have been referred and described to in that manner for a long, long time?

A. Yes.

Q. There's nothing new or unusual about the use of those terms, is that your testimony?

A. That's right, sir.

Q. And is it true or not that the use of those terms in that manner by the industry and the people in it was prevalent prior to the passage of the Fair Labor Standards Act in 1938 or -9?

A. Yes, because, like my own reference in about 1933—

Q. (Interrupting.) All right. Did you write a book in 1933 called The Personal Finance Business which was published by Harpers in that same year?

A. That was the first book published in that field.

Q. Would you recall, if I refreshed your recollection, a quotation from that book?

A. Yes, I would.

Q. At page 84 and 85 I find this statement—and you are talking about personal finance business, of course—“Every move adds to the expense: Loans which are a mere fraction of the amounts granted by commercial banks, and multitudinous clerical and managerial activities make for the difference between wholesale and retail lending.” Do you recall saying that?

76 A. I recall that.

Q. Sir?

A. I do. May I say that the comparison was even more cogent in those days than it is now. Because back in 1933 or '32 when I was writing the manuscript there were just a handful of banks in the country that did any direct consumer financing or lending. They were engaged entirely in commercial and real estate and other operations, and they were—they were afraid of this business, because they didn't know it. And they only came in reluctantly in the depths of the depression when their regular commercial loans, the short term loans, had dipped so low that they had to look for other sources of revenue, and they discovered two; one, the meter charges for small deposit accounts, such as ten cents for a check and so much for a deposit, and the other one, they looked to the small loan companies and discovered that the small loan company through the years of its operation had found that the individual with no security except his character was a sound credit risk. And so since then they have gone into it quite—quite heavily. So at that time the comparison would be more cogent than now. Then they had no small loan business. One bank, the National City Bank, led the procession in 1928. But it wasn't until the depths of the depression that the other banks really looked at this activity.

Q. Now, Doctor, I assume that you are familiar with the writings generally in the field of finance?

A. Yes, sir.

Q. I'll just ask you to tell the Court whether or not the writers in that field generally use these terms wholesale and retail to describe financial transactions?

77 A. Yes, they generally do, especially when they are trying to justify, or explain rather is the word, why these small loans have to have a higher rate—

Q. (Interrupting.) Yes.

A. (Continuing.) Then charged by—

Q. (Interrupting.) But when that term, or when those terms are used by a writer in the field, are they clear and is the meaning clear so that that would be an accurate description to be applied to a particular transaction?

A. Oh, yes.

Q. And would anybody reading that—that is, I say, anybody in the finance industry reading that particular literature, would they know what the writer was talking about?

A. Oh, they'd know.

Q. Wouldn't have any question. Now, would what you have been saying with reference to small loans and personal loans, apply just the same to the actual operations of the defendant companies here?

A. Yes.

Q. Including Kentucky Discount Company?

A. Yes.

By the COURT. Anything further of this witness?

Q. One minute, Judge. Just a minute, Doctor Neifeld. You said while ago that you had read the record in the Household Finance case?

A. Yes.

Q. Generally speaking, do you agree with the views of Mr. Leon Henderson, Mr. Schmus and Mr. Drelbelbis who testified in that case?

A. I do.

Q. I believe that's all Judge. Wait just one minute, please. That's all.

78 Cross-examination by Mr. JETER S. RAY:

Mr. RAY. Doctor Neifeld, your extensive experience in the finance has been gained, I believe you said, largely as employed or retained by this small loan policy making group, is that correct, or am I wrong about that?

Doctor NEIFELD. Well, in this, the experience with my own company, and I'm continuously in touch with all the other

phases of the finance industry. I attend the national meetings of the American Bankers, the Industrial Bankers, the American Finance Conference, all the other trade groups. I get their journals. I know hundreds of individuals in the field and meet them in various efforts and educational efforts that we—oh, for fifteen or twenty years I've been a member of the National Steering Committee—

Q. (Interrupting.) Doctor, you don't have to repeat all your qualifications. I simply wanted to know, and I think you've answered the question, but I'll ask it once more to be sure—but I might add that you could make your answer as brief as possible and I think we can finish much more quickly than we would otherwise, because these questions, most of them, can be answered simply because I don't know enough about your field to ask you questions that would give you too much trouble in answering. I'm afraid. Now, your experience that you have gained, however, grows out of your employment by the small loan industry, in a tangible sort of way, or auxiliary to it? In other words, largely, you go to these things because you are a part of this industry and you therefore have interest in them, and that is your—the basis of most of your experience as a part and parcel, and an authority, in the industry, is that correct or not?

A. Yes.

Q. Now, making small loans is the oldest form of a financial transaction known to man, is it not?

A. Oh, I suppose so; yes.

Q. That has grown—that is, that kind of financial transaction has grown until today it's—involves in the aggregate tremendous sums of money, does it not, the industry itself?

A. Yes.

Q. You have at your finger tips the approximate dollar amount involved in the small loan industry?

A. In the small loan industry?

Q. Yes?

A. One million eight—one billion eight hundred million dollars in outstanding—

Q. (Interrupting.) Is that just the personal loan part?

A. Just the personal loan.

Q. That does not include this discount and sales—purchase of conditional sales papers?

A. No.

Q. Now, you have heard, you say, these small loan departments in banks and small loan companies referred to, or analogized, to retailing in industry?

A. I can't accept the word analogy.

Q. Well, you have heard—

A. (Interrupting.) I've heard the term referred to.

Q. The reason you can't accept the word analogizing is because that wouldn't serve the particular purpose here. But nonetheless, that being a broader term description, could you not in fairness accept that terminology?

A. No. It's a—I conceive of it, and everybody that I know in the field is looking at it as retail operations; not by analogy but by a retail operation.

Q. Now, who, Doctor, besides yourself, can you name off-hand—and the three witnesses referred to in the
80 Household Finance case—has referred to the small loan business as a retail business?

A. Oh, I believe Doctor Phelps of the University of Southern California. I find something in his writings that distinguishes between retail and wholesale.

Q. Well, that's referred to in the Household Finance case, and was that not clearly used as an analogy rather than as a description of the industry?

A. No; I don't think so; no, sir.

Q. Well, it is—it is—I might inquire of counsel to shorten this thing. You do expect to put that evidence in the record, do you not, sir?

Mr. LEVIN. The three volumes have been a part of the record.

Q. I'll pass it now. Who else besides Professor Phelps?

A. Oh, there's a Doctor Truman—Doctor Foster who was a well known economist who died a few years ago who wrote one of the pamphlets for the—I've about forgotten—the Advisory—can't recall the name at the moment—but it's a series of public affairs pamphlets, produced by the Public Affairs—

Q. (Interrupting.) Just give us his full name?

A. William Truman Foster.

Q. Who else?

A. Doctor Albert Harrington, Professor of Marketing at Indiana University, and consultant to the National Retail Furniture Association.

Q. Can you specify within your memory the particular work in which he makes those references?

A. I can.

Q. Please do so, for the record?

81 A. He wrote a booklet called Instalment Financing Comes of Age in about 1942, I think, or '43.

Q. Who else are you willing to put on the record here as having taken that position?

A. Well, there have been many others, but I can't give you their names, because I've met them on platforms at various places where they have made speeches, and their speeches have eventually been published in the trade magazines and elsewhere.

Q. But you have given all those who readily come to your mind who have in a formal manner used the retail-wholesale—

A. (Interrupting.) Concept.

Q. (Continuing.) Wait a minute—wrote the wholesale-retail analogy, I was going to say?

A. I've given you those that come to my mind readily who have described this small loan business and instalment financing to the consumer as a retail business.

Q. Now, Doctor, you have also—(To the Reporter) Strike that. Have you heard references in your industry to small loan companies as "A Poor—The Poor Man's Bank"? Have you heard such references as that?

A. Yes. That was the term that was used very early in the 1920's or even before.

Q. Then you have heard that term used in describing the industry in your lifetime, rather in your later days, I might add, have you not?

A. Well, almost thirty years ago; yes.

Q. Well, have you heard it recently?

A. No.

Q. You have not?

A. No; I haven't seen it in writing, either.

82 Q. Is, based on your testimony here alone, is that not a convenient general description of this type of business? In other words, is it unfair to refer to small loan companies as "A Poor Man's Bank"?

A. It no longer is.

Q. I beg your pardon?

A. It no longer is.

Q. You say it no longer is a poor man's bank?

A. No longer is—

Q. (Interrupting.) I'm sorry, I misunderstood a great deal of your testimony which I thought—

A. (Interrupting.) My difficulty is with the use of your term, "Poor Man." I testified that the real poor man who doesn't—or the family that doesn't have the income has to be handled by social agencies. Now, people who have a reasonable income can be operated—can be handled on a commercial basis. Those are the people that are handled by the small loan companies. Now, the present—or the average income, in my company's case at least, the average borrower earns about three hundred fifty dollars a month. I wouldn't consider that a poor man.

Q. And you deny on this witness stand that you have heard references made to, or heard personal loan companies referred to as "Poor Man's Bank" in any recent years?

A. I haven't seen it in the news since that period.

Q. Well, I'm asking you if you have heard it used by speakers on the platforms and otherwise?

A. I'm replying that I haven't.

Q. You deny that you have?

A. Yes, sir.

Q. Now, Doctor, personal loan companies provide credit?

83 A. Yes.

Q. Or at least the Kentucky Finance Company provides credit, does it not—

A. (Interrupting.) Yes.

Q. (Continuing.) Particularly in its discount, the discount aspect of its business?

A. (Nods head affirmatively.)

Q. Is there any other respect in which you could properly say that these defendants operating this common office here in Louisville are engaged in credit transactions, or credit, providing credit?

A. I don't get the point. Could you re-state it some way?

Q. Well, I'll re-state it this way. In what other respects does Kentucky Finance and Kentucky Discount engage in providing credit, other than the discount part of the business?

A. Well, they are making loans to consumers.

Q. Now, by consumers you mean people who will spend the money quickly for something they need, is that what you are referring—is that your description of consumer?

A. Well, use the money for consumption purposes, for purposes of a household, or—

Q. (Interrupting.) But you are not saying on this witness stand that they are consuming the money?

A. They consume the money by spending it for food, or groceries, or rent, or medical service, or what not.

Q. Well, isn't that the same way that Henry Ford II consumes his money, by spending it, or anybody else?

A. Henry Ford does it for his personal need in the household, yes. But to the extent that the Ford Company does it for production and so on, it's in an entirely different category.

84 Q. Well, they put it to a different use.

A. Well, that's the whole difference between production and consumption, isn't it?

Q. You say then that the use to which it is put is the basis on which you are making reference to the fact that these are consumer loans?

A. (Nods head affirmatively.)

Q. Is that correct, sir?

A. That is correct.

Q. Now, you also indicated that this money which goes into the hands of these poor people, if I may use that term, largely, does not generate income. As an economist, I ask you if that is not recognized as one of the best methods that there is in order to generate income, put money in the hands of people by giving them minimum wages and so on so that they can—they will spend this quickly and the money will be in circulation and therefore income is generated by demand they have for goods and services on business establishments in the country?

A. Well, there is a theory of economics that you will generate business elsewhere in the economy by the trickle-up method. Put money in the hands of the consumer and he will spend it, and that will be somebody else's income so that it will keep the man going, and so on. There's a converse theory of trickle-down. Put the money in the hands of entrepreneurs who will undertake new developments and you will create more jobs and more income. But that's on the academic side. As far as this situation here is concerned, I'm thinking of the individual person who borrows from this Kentucky Finance Company. Borrows two hundred dollars.—He's borrowing for the use of his

personal and family necessity, the situation with which he's concerned. What happens with the second or third
85 passage of that money, that doesn't change his situation.

Q. Now, to get down just a little bit more to brass tacks, let me ask you this. Small loan companies are, are they not, generally regulated by the State Banking Departments?

A. They are.

Q. And under their jurisdiction?

A. Yes.

Q. You so—you made an analysis of that situation in your—in your Trends in Consumer Finance, which was published in 1954?

A. '54.

Q. And in that analysis you found that that was generally the case—that is, that they, these small loan companies are regulated by the banking departments of the various states,

A. Right, with some exceptions. In some states it might be that the Department of the Financial Institutions or some other technical name.

Q. I think, for example in Nevada I noticed they have it under the jurisdiction of the State Administrator according to your report?

A. Yes; and I think in Florida, too. I wouldn't be sure of that.

Q. Florida has it under the Comptroller. I suppose it would be the same thing.

A. Comptroller; yes.

Q. Now, in your same book, Trends in Consumer Finance, you make this statement, "Credit unions, sales finance companies and consumer finance companies were specially created after the turn of the century as institutions to make
86 credit readily available to consumers. They have become indispensable in the banking mechanism of the country, and their transactions reach considerable magnitude." Do you understand that—I mean, do you recall that passage in your book?

A. (Nods head affirmatively.)

Q. You still feel the same way about that as you did in 1954 when you wrote it?

A. (Nods head affirmatively.)

Q. Can it properly be said that personal loan companies are credit companies?

A. Well, I—I have some difficulty with that word credit companies because there is a specialized group known as commercial credit companies.

Q. Well, let's say credit institutions then?

A. Oh, yes.

Q. You say definitely they can properly be referred to as credit institutions?

A. On the wholesale and all the retail operations, the credit operations.

By the COURT. Are there further questions, gentlemen?

Q. One further question, Doctor, if I may. You referred to the fact that—the terms retail and wholesale have been used before state legislatures, did you not, to persuade them that a higher rate of interest should be—that analogy had been used to persuade state legislatures—

A. (Interrupting.) The point was made; yes.

Q. And that was pretty much the origin, was it not, of the use of the term retail in this particular industry?

A. Well, when the point was first made, you must know that these—making the loans to individual workmen, or white collar workers, on their own character and earning power was a
87 relatively new thing. And nobody had occasion to think about them before, except when they became important enough in what I call the fiscal mechanism of the country, and if you are writing a book for a college, and they say what type is it, you tell them a retail business.

Q. You made some reference to the fact that the term retail was first used in about 1920, is that right?

A. I didn't specify the date.

Q. Maybe I'm confusing you with some of the testimony in Household Finance.

A. Maybe you are.

Q. But does that date strike a responsive chord in any way as being about when the first reference was made to small loan companies as being the retailers, being like retailers?

A. I can't put my hand on any specific reference, but in the whole period of time that this problem was under discussion and laws were being formulated undoubtedly those terms were used.

Q. It's about the most potent argument that the—that is, the expense, the numerical number of transactions that are required in a number of small loans as against one large loan is

the most potent argument to have to have legislatures fix the higher rate of interest, is it not? or one of the most potent, to make your answer easier?

A. Well, yes.

Q. I believe that's all.

By the COURT. Any further questions? Any further witnesses?

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. DAWSON. Judge, we'll have a little rebuttal and I was going to ask a few minutes to get some material together. Would it be convenient for the Court and everybody if we took the noon recess now and came back?

By the COURT. You have some rebuttal?

88 Mr. DAWSON. I mean redirect.

Mr. RAY. This is your last witness?

Mr. DAWSON. This is our last witness, that's right.

By the COURT. How long would it take, Judge Dawson? Could we finish—does the plaintiff have any witnesses?

Mr. RAY. No.

Mr. DAWSON. I'm assuming we wouldn't get through before lunch.

Mr. RAY. We don't have any. As a matter of fact, we're somewhat surprised at this distinguished authority being thrust on us this morning in the way as an expert. We are not prepared—

By the COURT. Gentlemen, I understand what has been submitted in evidence here is a voluminous record of testimony taken in another case, and of course you are augmenting it here. Now, it would be perfectly all right—Doctor, you didn't testify in the Household Finance case, did you, sir?

A. No, sir.

By the COURT. But if you feel that you ought to put in further testimony—how much time do you want?

Mr. DAWSON. It won't take very long. Did I understand that you all have no witnesses?

Mr. RAY. No. We are getting this research data which has been compiled in the record. We have no oral. We have no oral.

Mr. LEVIN. Would Your Honor like to finish this morning?

Mr. DAWSON. We probably could, under the circumstances?

Mr. LEVIN. Unless you want to come back after lunch for about half an hour to an hour.

89 By the COURT. Gentlemen, I would assume that you would not want to argue this case. You are going to submit on briefs, isn't that correct? Is it necessary to argue this case?

Mr. LEVIN. I would suggest, and this is entirely for Your Honor's benefit, that you do have the benefit of an argument simply because this is rather an unusual case. It will undoubtedly go up, and the industry is interested, and so is the government. I've talked with other representatives of the Department of Labor. They're interested in having this issue reach the United States Supreme Court. And I don't think it would be fair to Your Honor not to give you the benefit of whatever experience we may have in this field. Now, counsel for the government of course does nothing but Department of Labor work. I happen to have had, been their adversary in several cases, including the Household, which I argued in the Third Circuit. And my services in expounding our position, I think, should be available, just as I think the services of the government counsel should be made available. Now, the question as to when Your Honor would like to have argument would be something else. It seems to me that perhaps it would be more helpful if Your Honor read the briefs.

By the COURT. I think argument——

Mr. LEVIN. I beg your pardon?

By the COURT. I was going to say that I don't think argument at this time before I've had a chance to look at the record would be too helpful.

Mr. LEVIN. I was just coming to that question. I should think we have given a rather voluminous brief to the government stating our position, and Your Honor has a copy. I should think that the government should be given an opportunity to answer that brief, because actually when
90 you get down to it we have really one basic legal issue here, and then when we get the government's brief we should have an opportunity to reply, and then if Your Honor desires, we can appear, and if you will give us an hour or so we could answer the doubts and questions that Your Honor may have. I should think that would be helpful.

By the COURT. Well, it would, after I've had a chance——

Mr. LEVIN. That's right.

By the COURT. To review the record. At this time, I don't think it would be.

Mr. LEVIN. No; it would not help.

By the COURT. Well, let's resolve the question as to whether you have additional proof you want to put on at this time?

Mr. RAY. Before we do that, I might say that Mr. Levin's suggestion meets what we think would be the most helpful to the Court, of the argument after brief.

By the COURT. I think so, too.

Mr. LEVIN. Now, I don't think, as far as our case is concerned, that we have anything more other than to ask the Doctor a few questions to tie in some of the literature *modus operandi* with respect to the three volumes. We ought to have——

By the COURT. Why don't we adjourn at this time for lunch.

Mr. DAWSON. That would be helpful.

By the COURT. All right. Gentlemen, we will adjourn until one-thirty. Mr. Crier, recess Court until one-thirty.

(Whereupon, at about the hour of 12:15 p. m., Court was declared in recess until 1:30 p. m.)

AFTERNOON SESSION

91 By the COURT. Any further testimony, gentlemen?

(Doctor MORRIS R. NEIFELD returns to witness stand.)

Redirect examination by Mr. HAROLD H. LEVIN:

Mr. LEVIN. Doctor Neifeld, on your cross-examination you were asked if you could recall the use of the terms retailing and wholesaling by person other than those who participated in the Household Finance case, and I assume that counsel meant to exclude also the material in the Household record which would be available here. Now, can you tell me that over the recess did you look over some of your papers and find any such references?

Doctor NEIFELD. Yes; I have several here.

Q. Now, would you be good enough to take each of those documents, and in order not to encumber the record, just give us the title of the document and the date of the publication, and read in the particular sentence or paragraph that will answer that question?

A. This is the document called Using Instalment Credit by

Professor Clyde William Phelps of University of Southern California, published in 1955, and I refer to this paragraph on page 24, "In short, business credit is an example of wholesale operation, while instalment credit is a case of retail operation." Is that sufficient?

Q. All right. Will you turn to another?

A. I happened to have this pamphlet, the Public Affairs Committee pamphlet, that I mentioned this morning, called Credit for Consumers, published by the Public Affairs pamphlets group.

92 Q. Doctor Neifeld, would you bear in mind that the stenographer has to get this, and read slowly?

A. On page 25, "Any consumer who bought flour by the carload would get a load price, but no consumer wants wholesale lots. The householder wants only a few pounds delivered at her home or her neighborhood store. Similarly, the consumer wants credit in small lots to fit his circumstances, and as with flour or coal or cotton cloth, he may pay more at retail than at wholesale."

Q. Get to the next one and just a little slower?

A. Yes, sir. This is a document sent out by the American Finance Conference, Incorporated, which is the trade association of discount finance companies, all the discount finance companies, with the exception of the so-called Big Three who don't belong to it. And this is information sent out this year, April 12, 1955, to their membership on how to handle the wholesale financing part of their procedures, in connection with financing because of the American Motors Corporation. And this is the same group sent out on the date of January 1, 19— for the fiscal year beginning January 1, 1956. This is an annual statement sent each member to be filled in by the member upon the basis upon which dues are to be computed for payment to this membership. And on page three the member is supposed to list statements relating to his operations for the year ending so and so: one, volume of retail contracts purchased, two, volume of wholesale during the period. That's all I have.

Q. Now, Doctor Neifeld, I think you testified that you attended many sessions and meetings in which various segments of the financial community and financial industry participated and were represented, is that correct?

A. That's correct.

Q. Now, can you recall for us a few examples of those?

93 A. I attend the annual meetings of all these trade associations: The American Bankers Association, The American Industrial Bankers Association, The American Finance Conference Association, and similar trade associations.

Q. Now, in the course of your attending these associations did you participate in the programs?

A. I have at various times.

Q. Did you participate in any symposiums?

A. I have.

Q. Did you participate with such symposium with the bankers for example?

A. I have.

Q. Now, in such connection and studies and in connection with your attendance at meetings of economics associations, et cetera, that you have testified to, did you thereby become familiar with the manner of speech and the discussions which are pertinent to the issue here?

A. I did.

Q. And did you have occasion in the course of those discussions to hear bankers and other people of the finance community, I mean apart from your own part of it, speak of retailing and wholesaling of loans and lending?

A. I have.

Q. And would you say that was true on many occasions?

A. Innumerable occasions.

Q. So that the concept of wholesaling and retailing is not confined to the instalment paper part of the industry, or the small loan part of the industry, is that correct?

A. No. That's correct.

94 Q. Now, Doctor Neifeld, your primary experience of course is with small loan companies, is that correct?

A. Yes.

Q. Isn't it a fact that of recent years many small loan companies as an adjunct to their small loan activities also carry on activities similar to that of Kentucky Discount in this case?

A. Yes.

Q. Now, just to make certain, I want to know from you whether there is any difference in your treatment of the activities of this instalment paper organization than the small loan organization—

A. (Interrupting.) No.

Q. (Continuing.) Yes or no?

A. No.

Q. No. And what you have said with respect to small loan companies applies, I take it, with equal force to the handling of this consumer paper?

A. It does.

Q. Now, you were asked about the use of the terms service. Have you any difficulty, as an economist and a writer, in using the term service in respect of what is done by a lending institution?

A. I have no difficulty.

Q. Well, how do you use that term service, and what does it mean? Whether you call it sales and service, or performance of a service for compensation, can you make some comparison with the services like it in other fields?

A. Well, it might be similar to the service that a hotel offers to a guest.

Q. In other words, do I understand you to say that when a hotel—when we stop at the Brown Hotel and we rent a room, we're paying for the service which consists of the use of a room?

95 A. Yes.

Q. And how would you compare that with—with the service that your lending institution makes?

A. The lending institution is making available to the individual consumer credit which he then can use to—for bills or all the other purposes.

Q. In other words, the hotel gives you the rooms to use, and the lending institution gives you money to use for a good purpose?

A. Yes.

Q. And would you say that could be likened to many other service places like, say, rental of a boat?

A. The rental of a boat, at a summer resort, relaxation resort, or even rental of a car from one of these agencies that have cars to rent.

Q. Do you mean like Hertz Drive Yourself?

A. Hertz, yes; and Avis.

Q. Well, would you have any greater difficulty or lesser difficulty in speaking of the service performed and rendered by a small loan office, or Kentucky Discount Office, than you would

with, say, take an extreme example, like an embalming establishment?

A. I wouldn't. But I think the thinking of the embalming establishment as a retail service organization might come a little strange to the average man on the street.

Q. But you would say that you—would you say this much that you could speak of a small loan office over here on South Fifth Street as being as much a retail service establishment as an embalming establishment?

A. I would.

Q. Would you say the same with respect to a dance hall?

96 A. I would.

Q. Would you say the same with respect to a crematory?

A. I would.

Q. Even though that may or may not be said to deal with the ultimate consumer?

A. And it may not appear in the ordinary line of conversation amongst consumers.

Q. That's all, Doctor Neifeld.

By the COURT. Any cross-examination?

Re-cross-examination by Mr. JETER S. RAY:

Mr. RAY. Doctor, have you ever testified before any congressional committees on this general subject?

Doctor NIEFELD. Not in Congress. But I have testified before the Senate Committee of the Dominion of Canada and before quite a few state legislative committees.

Q. Did your testimony there pertain to the wholesale-retail aspect of the financial industry?

A. We had no direct problem in that connection, as such, as far as the distinction went.

Q. Now, you, in referring to the service rendered by small loan companies, indicated that they were rendering service because they were making funds, or money, available to consumers, as I understand it?

A. Yes, sir.

Q. Now, is not also the larger financial institutions who make available funds to finance some larger undertaking also rendering a service?

A. Yes.

Q. Is it comparable, or the same general kind of service?

A. Now, wait—

97 Q. (Interrupting.) If not, what is the distinction in your mind?

A. The distinction is the purpose of the loan, one being at the end of the whole consumption distribution chain, and the loan being used for the individual as such as a consumer. In the other case it's being used for the purpose of the manufacturing plant or commercial organization.

Q. Well, in essence you are really drawing a distinction between what's large and what's small, aren't you?

A. No. It may be that you can have a consumer loan that's for ten thousand dollars, retail loan. That would perhaps finance the purpose of an automobile for consumption purposes. You can have a twenty dollar loan made by the Kentucky Loan Company to take somebody off a hot spot for a moment.

Q. It would be nothing strange either for a small loan company to lend a man three hundred dollars to set up a news stand or reading establishment or anything like that? That wouldn't be strange?

A. It would be very unusual.

Q. Beg your pardon?

A. It would be very unusual.

Q. But you don't know any reason why a small loan company would turn down a loan because that was the reason a man wanted it, do you?

A. Yes; I do.

Q. Now, what reason would there be?

A. Because the income of that type of business itself, individually, is too uncertain. Those are the riskiest loans to any finance company, any bank, or anybody else.

Q. Well, you then would say that the small loan companies are confining their loans to wage earners, would you?

98

A. Wage earners and salary recipients.

Q. Well, you know that this Kentucky Finance makes loans secured by collateral mortgages? Did you find that out when you inspected the place?

A. Well, I know the small loan companies essentially take collateral mortgages. But they are taken for the moral effect, not because they are used—not because they are taken back and sold, because that stuff has no value in the—

Q. (Interrupting.) Do I understand your testimony when that it would be a strange thing for a personal finance company to lend a man three hundred dollars who intended to use all or part of that money to, for some business purposes, as distinguished from a purpose to take care of his own personal needs?

A. It might happen in occasional instances, but it would be so small in statistics that it would be practically insignificant.

Q. Do you have anything to put your finger on, more concrete than your offhand opinion on that? Or is that what your statement is, an offhand opinion?

A. No, sir. It's based on the statistics of my own organization which we accumulate every quarter and often publish in our annual reports. It's based on the fact that in some states the uniform report to the banking department requires that type of information.

Q. Well, one other question, Doctor, and you being an outstanding economist, might be able to help us on this question. Money is a strange, or at least a unique, item in our life, and it's really—is or is it not its real purpose to facilitate the exchange of goods?

99 A. Well, money has also a value in setting prices, making price comparisons. It has a value as a storehouse of wealth.

Q. Now, I'm talking about the thousand-dollar bills that you may have in your pocket now——

A. (Interrupting.) You flatter me.

Q. (Continuing.) Is the real purpose of the money itself—I'm not talking about old coins that people might sell for premiums or anything like that; I'm talking about money, money in your pocket book—isn't the real purpose for which that is used, or its real justification for existence, the fact that it facilitates the exchange of goods in the general sense?

A. Yes. But it also has other purposes that have developed besides that primary, or fundamental, initial purpose.

Q. Well, are you saying that that is the primary fundamental purpose of money?

A. Yes.

Q. And the lending of money further helps carry that objective out, does it not?

A. Will you re-state that again?

Q. I say, the lending of money further helps carry out and further facilitates the exchange of goods between people?

A. Well, it—

Q. (Interrupting.) Puts more money—makes more money available for that purpose, does it not?

A. It makes money available at different times than it would otherwise be available. Not necessarily makes more money available.

Q. That's all.

100 Redirect examination by Mr. HAROLD H. LEVIN:

Mr. LEVIN. Just one question, Doctor Niefeld. You were asked whether a commercial bank renders a service, and I think you answered yes. And you added something about the difference between the service of the commercial bank and the service of the small loan company, or the discount company. I take it you were distinguishing there between the retail service and the wholesale service, but that both were services; is that correct?

A. Yes; that's correct.

Q. That's all.

By the COURT. All right. Any further questions, gentlemen? Any further testimony?

Mr. LEVIN. None for us.

By the COURT. Thank you, Doctor.

(Witness excused.)

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. LEVIN. We have one thing however to offer. I think we ought to dispose of the use of the records, either by way of a joint exhibit, by way of a Court exhibit, or by some kind of stipulation which would make available for the record any part of the testimony that either side desires to use, or any part of the literature contained in the record. Now, Your Honor may have some reference—

By the COURT. Well, what is this record now?

Mr. LEVIN. This is the record on appeal in Household—entitled Maurice J. Tobin, Secretary of Labor, United States Department of Labor, Appellee, versus Household Finance Corporation, Household Consumer Discount Company, a Corporation, and George E. Robey, an Individual, Appellants. Now, the title of that case in the lower court was Tobin v. Household Finance Corporation, et al., but by the time the decision came down in the Third Circuit Court of Appeals, so that there will be no confusion, I think the

record ought to identify this as the record in the case entitled in the official records as Mitchell v. Household Finance Corporation, et al.

By the COURT. All right. Well, may we consider that this record is introduced in evidence and considered read?

Mr. LEVIN. By both sides?

Mr. RAY. I would suggest a modification, if the Court please, and that is that we actually introduce into evidence only the testimony of those witnesses who testified on this exemption point, and there's three that were introduced by the defendant in that case and three by the—by the plaintiff.

Mr. LEVIN. I think there were four, with one not actually appearing.

By the COURT. It would be very helpful to the Court if you could specify the particular testimony of the particular witnesses you wish considered in this case.

Mr. LEVIN. There's also one other thing. I don't think counsel meant to overlook it. Volume III consists of material which both sides put in, I believe—literature, et cetera—and I think that also would be included, because the witnesses referred to it.

By the COURT. Now, gentlemen, will you prepare a stipulation? It seems that you are on common ground as to what part of this record is to be considered in this case.

Mr. LEVIN. That's not a problem, because there was no testimony taken on anything except the retail exemption. The only question, Your Honor, is this. This is rather voluminous.

Your Honor might prefer to have each side select such
102 portion of the testimony and the literature which they desire to make part of this record, and we could do it perhaps by an appendix to our brief. (To Mr. Ray) Is that all right with you?

Mr. RAY. I believe it would be simpler if we put the whole record in—

Mr. LEVIN. And it's understood, of course, that neither side certifies to the testimony of the other.

Mr. RAY. Well, treat it the same as if you were offering witnesses introduced by Household Finance and we were offering witnesses introduced by the Secretary of Labor in that particular case, the same as if they had come here and testified and been cross-examined.

By the COURT. Well—

Mr. LEVIN. And the same thing with respect to the written evidence?

Mr. RAY. Oh, yes.

Mr. LEVIN. On that basis we offer this as a joint exhibit.

By the COURT. All right.

Mr. LEVIN. Now, just one thing, Your Honor. I think for clarification, I think it would be a good idea at this point for each of us to state for the record what it is that we are pointing to, and I don't mean to summarize the evidence. But I would like to state for the record so that it will be handy when Your Honor reads the transcript that our witnesses consisted of four witnesses, one of them was Elmer Schmus, and one of them was Leon Henderson, and another was Mr. Dreibelbis who was—each of whom—none of whom, rather, was identified with the small loan part of the financial industry.

Now, Leon Henderson, as Your Honor probably recognizes, was an economist who did a great deal of research work, work for the government, had a great deal to do with Regulation W. I don't think that he need to be described to this Court. Now, Mr. Schmus, as I recall it, was the Chief Cashier, or the Cashier and First Vice-President of the First National Bank of Chicago, and he spoke from the point of view of the banker, what Doctor Neifeld described as the wholesale banker. Indeed, they lend money to Household Finance Company. Now, Mr. Dreibelbis was—Mr. Kelly could help me out on this.

Mr. KELLY. Mr. Dreibelbis was at one time General Counsel of the Federal Reserve Board and as such was chiefly responsible for drafting Regulation W when it was created. Thereafter he became head of the Department of Commercial Banking of Bankers Trust Company in New York, which position I think he still holds.

Mr. LEVIN. Now, those three gentlemen testified from their particular vantage points with respect to the chief issue which is before Your Honor, namely whether small loan offices and lending agencies that deal with the consuming public, the ultimate consumer, were recognized as retail service people, whether their services were so recognized, and whether their establishment was so recognized. And it was based on their testimony that the trial court found that Household was entitled to a finding that they were so recognized.

Now, the government had its witnesses, and I think perhaps counsel for the government should state who they were.

Mr. RAY. The government in that case had an equally—at least an equally—distinguished panel of three experts consisting of Mr. David C. Melnicoff, who was at that time head of the

104 Department of Selective Credit Regulations of the Federal Reserve Bank of Philadelphia, and has a long list of qualifications which are in the record. The second witness was Charles R. Whittlesey whose qualifications are in the record. And I might state for convenience that he's Professor of Finance and Economics and Chairman of the Department of Finance, Wharton School of Commerce and Finance at the University of Pennsylvania, holding degrees of A. B., A. M., and Ph. D. The next witness is Donald F. Blankertz who is also connected with the Wharton School in the capacity of Associate Professor of Marketing. And he holds the degrees from the University of Michigan, A. B., M. B. A., and Ph. D. in Business, and has other qualifications.

Now, those three witnesses, and the witnesses referred to by the defendant, discussed this problem in great detail—and I might say, to some extent beyond my comprehension, and I hope counsel on the other side can understand some of the theoretical matters that they get into. But nonetheless after reading the whole testimony, I believe it does shed some value to the decision in this matter.

Mr. LEVIN. I have but one addendum. I forgot to mention this one witness who was available at the trial named Paul Selby. He was the Executive Director, I believe, of the Consumer Finance Association, and it was stipulated by the government that he would testify similarly to Messrs. Henderson, Schmus and Dreibelbis. And I want to agree with counsel that the government had equally distinguished witnesses, but I should add to that that they did not speak from the point of view of the financial industry as the witnesses for the defendant did.

Mr. RAY. We submit that they spoke from the standpoint of public interest.

Mr. LEVIN. That completes, Your Honor, the case of the defendant.

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*In United States District Court**Order*

Entered Jan. 4, 1957

This case was called in open Court on January 4, 1957, for oral arguments, and there appeared Marvin Tincher and Jeter S. Ray for the plaintiff, and Thomas S. Dawson, Charles Kelly, Harold H. Levin and Frank A. Logan, for the defendants.

Mr. Harold H. Levin argued the case for the defendants.

Mr. Marvin Tincher argued the case for the plaintiffs.

The Court gave an oral opinion finding for the plaintiffs.

It is ordered that the plaintiffs be given thirty days from the date hereof in which to prepare, on notice, proposed Findings of Fact and Conclusions of Law, and the defendants a like period from the date plaintiff's Findings of Fact and Conclusions of Law is due, to file any objections thereto.

It is further ordered that counsel for plaintiff prepare and submit judgment within thirty days.

(S) HENRY L. BROOKS,
United States District Judge.

JANUARY 4, 1957.

Ces: For the Plaintiff: Mr. Marvin Tincher, Mr. Jeter S. Ray, 801 Broad Street, Nashville, Tenn. For the defendants: Mr. Thomas S. Dawson, Kentucky Home Life Bldg., 106 Louisville, Ky.; Mr. Charles Kelly, Hubachek and Kelly, Chicago, Illinois; Mr. Harold H. Levin, Proskauer, Rose, Goetz and Mendelsohn, New York City, New York; Mr. Frank A. Logan, 606 Kentucky Home Life Bldg., Louisville, Ky.

In United States District Court

Findings of fact and conclusions of law

Tendered by defendants Feb. 27, 1957

This cause came on for trial and the Court, having considered the evidence, the briefs, and arguments of counsel, hereby states the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Court adopts the Stipulation of the parties dated May 2, 1955, as part of its findings herein.

2. The plaintiff brings this action to enjoin defendants from violating the provisions of Sections 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act of 1938, as amended (29 U. S. C. Sec. 201, et seq.), hereinafter designated as the Act.

3. Defendant "Ky. Finance Co., Inc., No. 1, Louisville, Ky." (hereinafter designated as Kentucky Finance) and defendant "Ky. Discount, Inc., Louisville, Ky." (hereinafter designated as Kentucky Discount) are separate corporations, organized under the laws of the Commonwealth of Kentucky and
 107 having their principal offices and place of business (hereinafter referred to as the Louisville Office) located at 225 South Fifth Street, in Louisville, Jefferson County, Kentucky.

4. At the Louisville Office Kentucky Finance makes personal and chattel loans of cash in amounts ranging from \$5.00 to \$300.00. At the same office Kentucky Discount purchases conditional sales contracts from appliance and furniture dealers.

5. Approximately 60 percent of the gross dollar volume of business done by the Louisville Office consists of personal and chattel loans made and handled by Kentucky Finance. Approximately 40 percent of the gross dollar volume of business done by the Louisville Office consists of conditional sales contracts purchased and handled by Kentucky Discount. All employees in the Louisville Office perform duties in the same capacity for both defendants.

6. At the opening of the trial, defendants conceded for the purposes of this case, and the Court finds on the basis of such Stipulation, that defendants' employees are engaged in commerce within the meaning of the Fair Labor Standards Act and that prior to the filing of the present action defendants did not comply with Sections 7 and 11 (c) thereof.

7. The remaining issue presented is whether the employees of defendants—other than the General Manager and the Collection Manager—are exempt pursuant to Section 13(a)(2) of the Act as employees of a retail or service establishment. With respect to said issue, the Court finds that more than fifty percent (50%) of defendants' establishment's annual dollar volume of loans were made within the State of Kentucky, that seventy-five percent (75%) of the annual dollar volume of said

loans were made to ultimate borrowers not for re-lending to others, and that more than seventy-five percent (75%) of the lending services of defendants is recognized as retail services in the financial industry of which defendants' business and establishment are a part, and said establishment is recognized as a retail service establishment in said industry.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this action.

2. Defendants are subject to the provisions of Sections 7 and 11 (c) of the Fair Labor Standards Act, and their employees are entitled to the benefits thereof unless exempted by some provision of the Act.

3. Exemptions which withdraw from employees the benefits prescribed by the Act are to be strictly construed. The burden rests on the party asserting any exemption to establish that all requirements for the exemption have been met.

4. The issue respecting the exemption of a small loan establishment pursuant to Section 13 (a) (2) of the Fair Labor Standards Act, as amended in 1949, has been considered in two cases. *Tobin v. Household Finance Co.*, D. C. E. D. Pa., 106 F. Supp. 541, reversed on coverage subnom: *Mitchell v. Household Finance Co.*, 208 F. 2d 667, and *Mitchell v. Aetna Finance Co.*, D. C. R. I., 144 F. Supp. 528. The testimony in the Household Finance case on the subject of industry recognition was made part of the record in this case and, I am informed, in the Aetna Finance case. Both of these cases held, on virtually the same record that small loan establishments similar to the one here involved, though recognized as retail service establishments in the industry, were not among those intended to be exempted by the 1949 amendment. I am constrained to follow these decisions. Any change in interpretation of the amendment should be made by an appellate court. I conclude, therefore, that defendants' establishment is not a retail or service establishment within the meaning of Section 13 (a) (2), as amended.

5. The plaintiff is entitled to an injunction as prayed for in the Complaint.

United States District Judge.

In United States District Court

Findings of fact and conclusions of law

Signed by Judge Brooks on April 5, 1957

This cause came on for trial and the Court having considered the evidence, the briefs, and arguments of counsel, hereby states the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Court adopts the stipulation of the parties, dated May 2, 1955 as part of its findings herein.

2. The plaintiff brings this action to enjoin defendants from violating the provisions of Sections 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act of 1938, as amended (29 U. S. C. Sec. 201, et seq.), hereinafter designated as the Act.

3. Defendant Ky. Finance Co., Inc., No. 1, Louisville, Ky." (hereinafter designated as Kentucky Finance) and defendant "Ky. Discount, Inc., Louisville, Ky." (hereinafter designated as Kentucky Discount) are separate corporations, organized under the laws of the Commonwealth of Kentucky and having their principal offices and place of business (hereinafter referred to as the Louisville Office), located at 225 South Fifth Street, in Louisville, Jefferson County, Kentucky.

4. At the Louisville Office Kentucky Finance makes personal and chattel loans of cash in amounts ranging from \$5.00 to \$300.00. At the same office Kentucky Discount purchases conditional sales contracts from appliance and furniture dealers.

5. Approximately 60 percent of the gross dollar volume of business done by the Louisville Office consists of personal and chattel loans made and handled by Kentucky Finance. Approximately 40 percent of the gross dollar volume of business done by the Louisville Office consists of conditional sales contracts purchased and handled by Kentucky Discount. All employees in the Louisville Office perform duties in the same capacity for both defendants.

6. Defendants conceded at the opening of the trial and the Court finds, on the basis of the stipulation that approximately 9 percent of the dollar volume of defendants' business is done with out-of-state borrowers, that defendants' employees are engaged in interstate commerce or the production of goods for interstate commerce. Defendants also conceded and the Court

finds that prior to the filing of the present action defendants did not comply with Section 7 and Section 11 (c) of the Fair Labor Standards Act. The only issue thus presented for determination by the Court is whether employees of defendants—other than the general manager and the collection manager—are exempt from the overtime provisions of the Act by reason of Section 13 (a) (2) thereof, on the ground that they are employed by a retail or service establishment within the meaning of the Act.

7. On the basis of the stipulation and testimony the Court finds that more than 50 percentum of defendants' annual dollar volume of loans and purchases of conditional sales contracts are made within the State of Kentucky.

8. Subject to the same qualifications expressed by Chief Judge Kirkpatrick in *Tobin v. Household Finance Corp.*, 106 F. Supp. 541 (D. C. E. D. Pa.), and Judge Day in *Mitchell v. Aetna Finance Company*, 144 F. Supp. 528 (D. C. R. I.), this Court finds that the local offices of small loan companies are regarded in the financial industry as retail service establishments. However, this finding becomes immaterial in view of Conclusion of Law No. 4, hereinafter set forth.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this action.

2. Defendants are subject to the provisions of Sections 7 and 11 (c) of the Fair Labor Standards Act, and their employees are entitled to the benefits thereof unless exempted by some provision of the Act.

3. Exemptions which withdraw from employees the benefits prescribed by the Act are to be strictly construed. The burden rests on the party asserting any exemption to establish that all requirements for the exemption have been met.

4. On the authority and reasoning of Chief Judge Kirkpatrick and Judge Day in *Tobin v. Household Finance Corp.*, supra, and *Mitchell v. Aetna Finance Co.*, supra, the Court concludes that defendants' establishment involved in this case is not a retail or service establishment within the meaning of the exemption in Section 13 (a) (2) of the Fair Labor Standards Act.

5. The lending of money does not constitute the sale of either goods or services within the intendment of the Section 13 (a) (2) exemption.

112 6. In view of the foregoing conclusions, the Court does not find it necessary to decide whether the discount phase of defendants' business would be sufficient to defeat the Section 13 (a) (2) exemption if the personal loan phase of their business, standing alone, would qualify them for the exemption.

7. The plaintiff is entitled to an injunction as prayed in the complaint.

(S) HENRY L. BROOKS,
United States District Judge, 4-5-57.

Copies sent to attys. 4-6-57.

113 In United States District Court

Judgment

April 5, 1957

This cause having come on regularly for trial before this court, sitting without a jury, at Louisville, Kentucky on December 15, 1955, trial having been had upon the issues joined, and the court having made and entered findings of fact and conclusions of law herein.

Now, Therefore, upon the said findings of fact and conclusions of law, and sufficient reason therefor appearing, it is hereby

Ordered, Adjudged And Decreed that defendants, their officers, agents, servants, employees, attorneys and all persons acting or claiming to act in their behalf and interest be, and they hereby are, permanently enjoined and restrained from violating the provisions of Sections 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act of 1938, as amended (Act of June 25, 1938, c. 676, 52 Stat. 1060; Act of October 26, 1949, c. 736, 63 Stat. 910; Act of August 12, 1955, c. 867, 69 Stat. 711; U. S. C. Title 29, Sec. 201, set seq.), hereinafter referred to as the Act, in any of the following manners:

(1) The defendants shall not, contrary to Section 7 of the Act, employ any of their employees engaged in interstate commerce or the production of goods for interstate commerce, as defined by the Act, for a workweek longer than forty (40) hours

unless the employee receives compensation for his employment in excess of forty (40) hours at a rate not less than one and one-half ($1\frac{1}{2}$) times the regular rate at which he is employed.

(2) The defendants shall not fail to make, keep and preserve records of their employees and of the wages, hours and other conditions and practices of employment maintained by
114 them, as prescribed by the regulations of the Administrator issued and from time to time amended pursuant to Section 11 (c) of the Act and found in Title 29, Chapter V, Code of Federal Regulations, Part 516, and particularly, but not in limitation of this paragraph, shall not fail to show adequately and accurately, among other things, the home addresses and occupations, the hours worked each workday, the total hours worked each work-week, the regular hourly rate of pay, the total daily or weekly straight-time earnings or wages, the total weekly overtime excess compensation, and the total wages paid each pay period with respect to their said employees.

It is further ordered that legally taxable costs herein shall be paid by the defendants.

Dated: 4-5-1957.

(S) HENRY L. BROOKS,
United States District Judge.

Judgment prepared by Jeter S. Ray, Marvin M. Tinch, Attorneys for Plaintiff.

Copy to Attys. 4-6-57, Jeter S. Ray, Frank A. Logan, Bullitt, Dawson & Tarrant.

In United States District Court

Notice of appeal

Filed April 27, 1957

Notice is hereby given that the defendants, Kentucky Finance Company, Inc., and Kentucky Discount, Inc., hereby appeal to the United States Court of Appeals for the Sixth Circuit from the Judgment which was entered in this action on April 5, 1957.

FRANK A. LOGAN,
606 Kentucky Home Life Building,
Louisville 2, Kentucky,

THOS. S. DAWSON,
BULLITT, DAWSON & TARRANT,
1700 Kentucky Home Life Building,
Louisville 2, Kentucky,

Counsel for Defendants, Kentucky Finance Company,
Inc. and Kentucky Discount, Inc.

By (S) FRANK A. LOGAN.

In United States District Court

Bond for costs on appeal

Filed on April 27, 1957

We the undersigned, jointly and severally acknowledge that we, our successors and assigns, are bound to pay to James P. Mitchell, Secretary of Labor, United States Department of Labor, Plaintiff, the sum of Two Hundred Fifty (\$250.00) Dollars.

The condition of this bond is that, whereas the defendant has appealed to the Court of Appeals for the Sixth Circuit, by Notice of Appeal filed April 27, 1957, from the Judgment of this Court entered April 5, 1957, if the defendant shall pay all costs adjudged against him, if the appeal is dismissed or the Judgment affirmed, or such costs as the Appellate Court may award if the Judgment is modified, then this bond is to be void, but if the defendant fails to perform this condition, payment of the amount of this bond shall be due forthwith.

[SEAL]

KENTUCKY FINANCE COMPANY,

By (S) G. D. KINCAID, *President,*

Central Bank Building, Lexington, Ky.,

Defendant.

AMERICAN CASUALTY COMPANY

OF READING, PENNSYLVANIA,

By (S) W. E. KINGSLEY,

Attorney-in-Fact,

Surety.

No. 5206.

United States Court of Appeals
For the First Circuit

AETNA FINANCE COMPANY,

DEFENDANT, APPELLANT,

v.

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor,

PLAINTIFF, APPELLEE.

RECORD APPENDIX
TO
BRIEF FOR APPELLANT

VOLUME II.

Court Exhibits 1 and 2

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COURT'S EXHIBIT 1

[43a] LEON HENDERSON, having been duly sworn was examined and testified as follows:

DIRECT EXAMINATION.

[44a] (The statement of qualifications of Leon Henderson follows:

(42) "January 14, 1952 :

EDUCATION AND EXPERIENCE
OF

LEON HENDERSON

(Office—1026 17th Street, N. W.—
Washington, D. C.)

1. Educational Background:

1913-1914 University of Pennsylvania.

1915-1917 Swarthmore College, A.D. Degree

1919-1920

1917-1919 U. S. Army—discharged as Captain, Ordnance Dept, U. S. A.

1920-1922 University of Pennsylvania — Graduate Work.

1919-1922 Instructor — Wharton School of Finance University of Pennsylvania.

1922-1923 Associate Professor of Economics — Carnegie Institute of Technology.

1936 Lecturing Professor in Economics, University of Miami, Florida.

2. Government Activities in State of Pennsylvania.

1923-1925 Occupied positions of Deputy Secretary of Commonwealth; Secretary State Employees Retirement System; State Personnel Officer; State Director of Accounts. Re-classified state (43) per-

sonnel and set up state retirement program for 15,000 employees.

[45a] 3. Private Activities as Economist Prior to Federal Government Service:

1925-1934 Director of Remedial Loans, Russell Sage Foundation. As such generally engaged in studies of consumer credit, investigation and prosecution of loan sharks, study of entire field of problems of necessitous small borrowers and particularly active in sponsoring and obtaining passage of the R. S. F. Uniform Small Loan Law in various states, under which legislation small loan companies have operated and still continue to operate.

4. Positions Held and General Activities with Federal Government:

January 1934-July 1935—Under General Johnson, Administrator, Director of Division of Planning and Research, National Recovery Administration, and later member, National Industrial Recovery Board.

September 1935-December 1935—Economic Advisor to Senate Committee on Manufacturing, on Loan (44) from N. P. A.

November 1936-July 1938—Consulting Economist, Works Progress Administration. Special assignments from Administrator Hopkins, unemployment relief, business activity, recovery measures, etc.

July 1938-Fall 1939—Executive Secretary, Temporary National Economic Committee. (Monopoly study)

May 1939-July 1941—Commissioner, Securities and Exchange Commission. Duties: As one of five commissioners to administer the Securities Acts of 1933 and 1934 and the Public Utility Holding Company Act of 1935.

May 1940-July 1941—National Defense Advisory Com-
[46a] mission, Commissioner in Charge Price

Stabilization. Duties: In this capacity, responsible for making recommendations to the President on price increases which were determined to be unjustified and as a member of the Commission to make joint recommendations to the President on the defense program.

August 1941-December 1942 — Director, Division of Civilian Supply, in OPACS, OPN, and later, War (45) Production Board.

Duties: To represent civilian economy in the allocation between military, civilian and foreign requirements and formulate programs for distribution and allocation of materials for civilian uses among competing demands—to direct flow in adequate quantities to maintain essential civilian requirements and recommend reduction of non-essential demands through curtailment.

July 1941-January 1943—Administrator, Office of Price Administration.

Duties: To carry out provisions of the Price Control Executive Order and later the Emergency Price Control Act of 1942, dealing with prices and rents; together with promulgation and administration of rationing programs as directed by WPB, Agriculture, etc. As Administrator, member of War Production Board and Committee on Policy for Regulation W.

5. Special Experience in Field of Statistics:

- a. Statistical work with Russell Sage Foundation, (46), including statistical studies in cost of medical care, of estimates of debt, and initiated statistical estimates of consumer credit, later taken over by Department of Commerce and subsequently by Federal Reserve Board.

[47a] b. In NRA, responsible for all its business, industrial and employment statistics and a member of Central Statistical Board.

c. WPA work in the field of industrial, business employment statistics and, while there, prepared statistical and economic material for use in the hearings on the Black-Connery Bill (predecessor to Fair Labor Standards Bill).

6. Economic Activities and Positions with Private Organizations Since Leaving Active Government Service in 1943:

a. Presently consulting economist, Research Institute of America.

b. Director of Research, Jewelry Research Foundation.

c. Member of Board of Directors of National Planning Association.

(47) d. Economic advisor on inflation to the governments of China and Guatemala. (1945)

e. Survey of plans for economic control of Germany. (1944-45)

f. President of International Hudson Corporation, a foreign trade advisory corporation.

g. Economic advisor to various companies and legal firms.

h. Consulting economist for business committees on excise taxation.

[48a] Q. Would you tell us first, then, Mr. Henderson, something about your particular experience and familiarity with the licensed small loan business, starting, if you will, with your work at the Russell Sage Foundation?

A. If I may, I would like to give a brief history of the Russell Sage Foundation because I was the third Director of their Division of Remedial Loans which dealt with the small loan business.

The Russell Sage Foundation was created in 1907 by Mrs. Russell Sage. I believe the original grant was about 10 million dollars and an additional 5 million later. I believe Robert W. deForrest was the architect of the Foundation.

The Russell Sage Foundation, at that time the (49) third largest of the foundations, spent a considerable amount of time on how it would follow out the directions of Mrs. Sage for "improvement of social and living conditions." It was decided that they would give grants, as was the custom of foundations, for specific studies, and that they would make an unusual venture which would establish full-time departments.

Two of the studies that they financed were for research studies into the loan shark business, one by Wassam and one by Arthur Hamm. I might add that when the announcement of the grant was made, Mrs. Sage was besieged with personal applications for relief and she had what I believe would be called an almoner who undertook to look into the 60,000 appeals she had in the first two years. That almoner was W. Frank Persons, and he ran into so many loan shark cases where the families' acute necessities were due to the exactions of the loan shark, that he even made a recommendation to Mr. deForrest long in advance that they [49a] consider, study and work toward an organized business which would do the lending of small sums to necessities borrowers on a business basis with ethical concepts.

Q. How long were you with them?

A. I was with them from 1925 until 1934, when I went to Washington on a temporary job, so-called, with the NRA, and I believe I resigned that year. In other words, I determined that I would not go back to the Sage Foundation.

Q. I suppose that gave you a pretty thorough knowledge of (51) the business all over the country, the small loan business.

[50a] A. That is true, and because this period of the 1920's was the burgeoning of the consumer credit and the use of credit, and the purchase of time-sales was expanding and the use of loan credit by various kinds of consumer credit agents was expanding, and I found it very necessary to be acquainted with the entire field.

[53a] Q. Now, again, Mr. Henderson, without going into any detail at this time on the subject, could you tell us whether you had some further special experience with the licensed small loan business in connection with your governmental capacities in connection with executive order 8843 of August 9th, 1941, and Regulation W, dealing with the control of consumer credit, which regulation was issued pursuant to that executive order?

A. Yes, I did. I was appointed in 1940 as the Price Commissioner on the National Defense Advisory Commission and the outlines of this job were not set forth very specifically. And, then, in April, I believe, of 1941, by Executive Order of the President, created the Office of Price Administration and Civilian Supply, abbreviated to OPACS.

And since there was no definitive legislative enactments relating to the control of inflation, we busied ourselves with all the factors that would either accelerate inflation or affect the supply or demand side of goods.

Naturally, one of these was the matter of Consumer Credit. I spoke of the work which Mr. Nugent had been doing on relation of consumer credit to economic stability and it was a pretty well-held thesis at that time that in the periods of rising activity, the extra purchasing power (57) created by consumer credit did, you might say, accelerate the boom and, likewise, the liquidation of consumer credit reduced the already low volume of purchasing power when there was a depression.

I think the consumer credit receivables shrunk about four billion dollars in the first part of the 1930 depression.

[54a] So, I was trying to find means by which we could bring this under some kind of control and I had a number of conversations with monetary and fiscal officers in the federal government and particularly with Mr. Eccles, the Chairman of the Federal Reserve Board. And that led to a number of discussions and proposals to the President for this executive order as another one of the restraints on inflation.

Q. Now, Mr. Henderson, we have been discussing here the small loan business or the licensed small loan installment business, which terms are synonymous as I understand it, without what your understanding is or how you would describe or define that business.

A. Well, the small loan business, as it was regarded by [55a] the Russell Sage Foundation, was the business of lending small sums to consumers either for the purchase of consumer goods and services or for financing and re-financing of debts that had grown out of the purchase of these consumer goods and services, and it was the business pretty much as conducted under the Small Loan Laws, the Russell Sage Law (59) and similar laws, that we regarded as the small loan business.

I think it was mainly the security of chattels, wage assignments and simple promissory notes. So it was called a business, small loan business, the licensed small loan business, the licensed installment loan business.

[56a] Q. Mr. Henderson, in your opinion is the small loan business, as we have described it here, recognized or considered as a separate industry or as part of some larger industry?

A. I would say it is part of a much larger industry.

Q. And what would you say that larger industry is, in other words, that we constitute a part of, or the small loan business constitutes a part of?

(61) A. I would say the financial industry.

Q. So, as I understand it, it is your opinion that the small loan business as such is part of a larger industry known as—known generally as—the financial industry, is that correct?

A. That is correct.

Q. Would you be good enough, then, Mr. Henderson, to describe for us the financial industry as you understand it with respect to the general scope and the types of organizations or institutions which are included in your concept of the financial industry?

[57a] A. Well, I don't believe that I can recite a textbook or complete classification. I would say, first, commercial banks and similar banking institutions that are set apart because of their deposit function, and they differ as between the national and state banking charters with what they can do, but they are predominantly institutions that make extensions of financial credit and loan money. That is one whole large group.

Then, there is what is known as the investment banking business that undertakes to underwrite, frequently, the sale of securities for the purpose of providing loanable funds, capital funds, for other companies.

And, then, there is a whole group of commercial (62) type finance companies that, except in rare instances, have no deposit function but they do make loans, generally, to business, as factors, loaning on commercial paper or accounts receivable and inventories and various kinds of special commodity loans.

Q. You are on the subject of commercial finance com-

panies. Did you want to add anything there or did you want to move on?

[58a] A. No, I think the next group is the insurance group. They have a constant flow-in of cash. And in order to meet their (63) contracts on insurance, they loan on real estate—they were predominantly in real estate at one time, and in recent years they have gotten into the financing of business on a very, very large scale.

Then, I would say there is the next group. The fifth group I would say is the installment finance company.

Q. Aren't they sometimes known as installment sales finance companies, also, Mr. Henderson?

A. Yes, because they finance the sales of commodities on an installment repayment basis. Now, these companies are those which finance the sale of consumer durable goods, automobiles and things like that, and, in some cases, they finance the dealers, floor plan kind of loans, and in some cases they deal directly with the actual, ultimate buyer of the consumer goods itself.

Q. Excuse me. Could we clarify that for a moment? As I understand it, these installment sales finance companies which you are now discussing, generally, perform two functions. One, the financing of the consumer in the purchase of an automobile or refrigerator, that is, when the consumer wants to buy one they finance him, and, two, that they engage in another type of financing which you have called a floor plan, which, I understand—and tell me whether I am correct about (64) it—is a financing of the dealer himself so that he, in turn, can pay for cars that he buys from the manufacturer, is that correct?

A. That is correct. In the latter case, the dealer himself arranges for the extension of credit with the installment sales finance company, using the instrument that has been given to him in payment by the purchaser.

The next group is the industrial banks, and we used to

say the Morris Plan Banks and the imitation Morris Plan Banks, when the Morris Plan form of industrial loans was predominant. Because of their relative success, there were [59a] a lot of new entrants in the field and new legislation to either give them status, as members, or the sale of their securities. And this group, I think, has become almost exclusively known as the industrial banks. It has, I would say, only in rare instances, a deposit function, and the foundation of their business was loans to consumers.

Then, there is a group which I would say is the next group, about the 7th group, partly on account of their age persistence, and is the cooperative group and the remedial loan or the semi-philanthropic type.

The cooperative includes the state credit unions, which preceded them, and the federal credit unions, which were authorized later.

[60a] Q. Will you proceed, please?

A. Well, I would say number eight would be the pawn brokers. Again, they bulked large before the flowering of the other type of institutions that began in the 1920's. And then finally—

Q. Well, there are still plenty of them around, aren't there, Mr. Henderson?

A. Oh, yes.

Q. All right. Now, do you have any other groups that you want to mention?

A. Well, then there are what I would call the personal loan departments of banks, and while there were some of the personal loans of banks that were brought into departments in the early 20's, the real burgeoning began with the establishment of a personal loan department by the National City Bank in 1928, and since that time there has been a steady growth of the departmentalization of personal

loans and offering loans to consumers through the customary media.

[61a] (69) Now, do you have any other groups you want to add?

A. Then, of course, there is what we call the licensed small loan companies, the personal loan companies or the licensed installment loan companies, and that is the group which generally operates under the regulatory acts, similar to the one in the State of Pennsylvania.

[62a] Q. And that is the group you have already described in some detail, is that correct?

A. That is the one that I would say we would call the personal loan business.

Q. Now, in giving us your opinion, Mr. Henderson, that these various types of organizations or institutions or groups which you have listed all form a part of what you describe as the financial industry, is it fair to say that what they have in common, and the reason that you classify them that way as part of the financial industry, is because these organizations are predominantly engaged in the business of extending credit or lending money? Is that the test that you apply?

A. Yes.

Q. And when you described your tenth group, Mr. Henderson, describing the licensed small loan business, (70) were you referring to operations such as are described in this case at the Lancaster office of Household and Household Discount and some other operations in the licensed small loans business?

A. Yes.

Q. Now, Mr. Henderson, is there any commonly understood and recognized distinction in the financial industry between organizations rendering wholesale credit or money lending services and those organizations or institutions

which extend retail credit or perform money lending services, retail money lending services?

A. Well, in all my experience, intensive experience, with the Sage Foundation and my related experience since, there has always been that commonly recognized difference between the financial instrumentalities which are wholesalers and the instrumentalities which are retailers.

Q. You say that on the basis of your experience there has always been that commonly understood distinction; would you describe for us your understanding of what that distinction is and has been over the years?

[63a] A. Well, the distinction is particularly one of whether or not the predominant part of the business was for extending credit or loans to other businesses. (71) That, I would say, would be the wholesale and, of course, the size of the extension of credit or, loan would have something to do with it. But I would say that the retail end of the thing, retail end of the financial industry, was characterized by extension of credit or loans to consumers.

I think when I was defining the small loans business that I indicated that some of the characteristics were the smallness of the loan, the consumptive purposes, and usually the installment repayment characteristic, but the ultimate test was whether—

[64a] A. —was whether the credit or the loan was to the individual for consumptive purposes. There might be some small part related to the installment feature that I mentioned before, because the installments were geared to the periods of payroll payments.

Q. Mr. Henderson, again to be perfectly clear, you say that the basic distinction between the wholesale and retail function is, one, the extension of credit or making loans to business or industry for business purposes, as distinguished from the retail function of making loans to the individual

or the family to meet consumer needs? Is that the distinction?

A. That is the distinction.

Q. Now, is that the distinction as you have described it [65a] which is and has been recognized over the years to your knowledge in all of the fields of experience in (74) which you have engaged?

[67a] Q. Well, now, Mr. Henderson, I think we are clear. In connection with your Russell Sage Foundation experience you tell us that there was a commonly understood distinction not merely among persons in the financial industry but people outside the financial industry, (77) with respect to the difference between wholesale and retail, is that correct?

A. Yes, and the thought has come to my mind—

Q. Go ahead.

A. I don't want to be prolix, but in this period I was trying to persuade banks and banking institutions that they should be of help and take some part in it, and usually they would say, "Well, we are wholesalers of credit, we have got no experience except with our own customers on the making of loans."

(78) Q. And the distinction that you make is a distinction drawn not only from your opinion but the opinion of all of the people with whom you dealt as you have described it, is that correct?

A. That is correct, and this wasn't a casual distinction at all because we wanted to get into it. I would say it was the basis of a lot of the work that we were doing at the Sage Foundation on this matter of regulation. We had had a Credit Union law, we had a Uniform Pawn Brokerage law, we had the Uniform Small Loan law, we were considering a uniform law on sales financing contracts and a uniform law on industrial banks, and in some cases did

participate in the drafting of legislation which improved the regulatory features on the Morris Plan banks and similar banks.

[68a] Q. What other groups in the communities in the various states with which you operated—with what other groups was this problem discussed?

[69a] A. I worked with the state banking officials and also the specific persons who were designated to handle the regulation under the law.

I dealt, for example, with the National City Bank when it was planning its small loan department. I had a series of conferences with President Charlie Mitchell, and later with Mr. Steffan; and in this period I was on a Federal Reserve Board committee that was considering all types of expansion of credit. I think that was around 1930.

[74a] (A booklet entitled "Excerpts from publishing material showing that members of the small loan business have regarded it as a retail service business. Prepared by Leon Henderson," was marked Exhibit D-1. Copy of the exhibit follows.)

[75a] **EXHIBIT D-1:**

"Excerpts from published material showing that members of the small loan business have regarded it as a retail service business.

Prepared by Leon Henderson

1. **WHAT DO YOU PAY FOR MONEY?**

(Ted Leitzell. Published in Real America, March, 1936.)

"Household says it is in the business of retailing credit. Its preferred stockholders receive 8 per cent dividends; it borrows money from banks at going rates.

Its average cost of money is about 7 per cent. Its average loan is for \$189, and its average interest rate is about (88) 34 per cent per year; the average rate collected is 29 per cent of assets used. It therefore retails its credit at about four times what it pays for it. This difference is accounted for as the cost of 'retailing' money in 'broken lots.'

(Page 88)

2. SIMILARITIES AND DIFFERENCES IN PERSONAL LOAN AND DISCOUNT OPERATIONS

(E. R. Wonderlic. Vice President of the General Finance Corporation. Published in Consumer Finance News, January, 1950.)

"The small loan business obtains its volume on a direct appeal to the retail consumer. It is a business of obtaining customers one at a time, and it is a business where customers are also lost one at a time. New customers normally account for 25 per cent of the loans made; former borrowers, people who formerly borrowed [76a] and are returning for another loan, account for another 25 per cent of the loans made; and present borrowers requiring additional cash, as add-on cash requirements to their present loans, account for the remaining 50 per cent of loans made in a typical established loan office. Acquisition problems in the loan business become one of the continuous service to thousands (89) of retail customers rather than concentrated service and sales effort to ten or twenty automobile dealers."

(Page 4)

3. WORKING TOGETHER AT COMMONWEALTH

(Published in "We" by the Commonwealth Loan Company.)

"Such laws recognize that rates on small installment loans must be higher than those on large commercial

loans because small loan companies are engaged in retail lending whereas commercial loans represent lending at wholesale." (Page 5)

4. THE STORY OF THE SMALL LOAN BUSINESS IN CALIFORNIA

(Published by the California Association of Small Loan Companies.)

"Small Loan Companies Retail Money as Department Stores Retail Goods.

"A small loan company is engaged in the business of retailing money * * *"

"To lend \$100,000 at retail, a small loan company must investigate and interview an average of 1769 loan applicants." (Page 5)

5. THE CONSUMER FINANCE BUSINESS IN ILLINOIS

(Published by the Illinois Consumer Finance Association, January, 1949.)

[77a] "People who say this overlook the fact that small (90) loan companies are engaged in retail lending, while commercial loans represent lending at wholesale." (Page 7)

6. THE PERSONAL FINANCE BUSINESS IN NEW YORK

(Published by the New York Association of Personal Finance Companies, 1937)

"In retailing \$1,000,000 the small loan company must interview 22,700 applicants." (Page 7)

7. A LOOK AT THE CONSUMER FINANCE BUSINESS IN NEW YORK STATE

(Published by the New York State Consumer Finance Association, 1950.)

"The fundamental reason why these charges are higher * * * is that it costs more to grant retail credit than wholesale credit." (Page 14)

8. SMALL LOAN SERVICE IN PENNSYLVANIA

(Published by the Pennsylvania Association of Small Loan Companies, August, 1942.)

"In money lending, as in other lines of merchandising, there are two general types of business: that which puts out money in wholesale amounts for production and distribution, and that which retails it in small sums to the consumer." (Page 9)

9. FACTS ABOUT THE SMALL LOAN BUSINESS IN UTAH

(Published by the Utah Association of Small Loan Companies, February, 1945.)

(91) "Retailing of Money Expensive Business

"The small loan operator is essentially a retailer." (Page 3)

[78a] 10. CHARGE FOR A PERSONAL LOAN

(Published by the Industrial Lenders Technical Institute, 1938.)

"By what standards are our charges to be judged, with what are we to compare them? Surely, with other charges for consumer credit, and also, since the charge by personal finance companies represents gross profit in the retailing of money, by comparison with the gross profits of *other forms of retail business*. Nothing is accomplished by shrugging one's shoulders and saying, '3½ per cent a month—Mm'm—42 per cent a year!'" (Page 6)

"It is clear that a law which regulates the rate of interest authorized by banks cannot apply to the rate of interest which must be charged by lenders of small sums of money. Banks are wholesalers of money, personal financiers are retailers. Money can no more be profitably loaned in scores of small amounts at the same price, it can be loaned in one large amount, than

coal can be sold by the (92) bushel at the same price it can be sold in carload lots." (Page 8)

11. RETAIL MARK-UP AND GROSS PROFITS

(Published by the Industrial Lenders Technical Institute, 1938.)

"Let us examine the instalment seller from another angle. He buys his merchandise in wholesale lots, to this cost he adds his operating expenses and an allowance for profit and thus determines his retail selling price. Personal financiers deal in money, which is as much a commodity that is bought and sold as is furniture. They also buy at wholesale prices, make allowances for operating expenses and a margin of profit and thus determine the cost to the retail buyer. In [79a] merchandising circles this setting of a retail price is termed 'mark-up.' The industrial lenders' mark-up is there for everyone to see, 3½ per cent per month—but will you find the amount of mark-up on the furniture dealers' price tags?" (Page 11)

12. THE MONEY RETAILER HELPS FAMILIES PAY MAIN STREET MERCHANTS

(Advertising prepared by Household Finance Corporation, 1936.)

"He is the retailer of money—the family finance (93) company. To him families may go when money is needed, just as they go to the grocer when food is wanted. His expenses are as great as other retailers, for he, too, retails in small amounts. But his gross profit on every transaction is exceedingly small. Unlike other dealers, the maximum charge he may make for his services is fixed by the laws of this state."

13. YOUR CONSUMER CREDIT DEPARTMENT GOLD MINE OR RAT HOLE?

(Published in the American Finance Conference, August, 1950.)

"Commercial loans represent wholesale credit and consumed financing is *retail* credit." (Page 7)

14. FINANCING THE AMERICAN FAMILY

(Published by Household Finance Corporation, 1947.)

"For many years the retail nature of the business of making small loans to be repaid in monthly installments was ignored. Until 1911 legislatures assumed that such loans could be handled at the low rates provided in state usury laws." (Page 3)

"It costs more relatively to retail small sums of money than to lend large amounts, for the same reason [80a] that apples are sold more dearly by the pound than by the carload." (Page 9)

(94) 15. SERVING THE SMALL LOAN NEEDS OF IOWA BORROWERS

(Published by the Iowa Association of Personal Finance Companies, August, 1940.)

"In retailing \$100,000 a small loan company must interview 2,476 applicants." (Page 11)

16. EVERY SEVENTH FAMILY

(Published by the Ohio Association of Small Loan Companies, 1949.)

"There is no mystery about charges for small loans. Small-loan companies are engaged in a retail business. Lending money in small sums at retail involves considerable expense." (Page 3)

17. THE COST OF CREDIT

(Published by the American Association of Personal Finance Companies, 1938.)

"The retail nature of the personal finance company business is evidenced by actual figures based on operation of a personal finance company, a small bank and a large bank. These figures show that a personal finance company must make 16 loans to equal the amount of one average sized loan made by a small

bank, and 63 loans to equal the amount of one average sized loan made by a large bank. A personal finance company must employ 12 persons to handle the same dollar volume of loans handled by one employee in a small bank and 58 persons to (95) handle the same dollar volume of loans handled by one employee in a large bank." (Page 2)

[81a] 18. THE LICENSED LENDER

(Edgar F. Fowler, Secretary of the American Association of Personal Finance Companies, Washington, D.C. Published in The Annals of The American Academy of Political and Social Science, March, 1938.)

"Commercial banks are wholesalers of cash—except where they operate small loan departments—while personal loan companies are retailers. (Page 132)

[82a] (A booklet entitled "Excerpts from published statements of economists and others that the small loan business is a [83a] retail service business, Prepared by Leon Henderson," was marked Exhibit D-2. A copy of the exhibit follows:)

(98) EXHIBIT D-2.

"Excerpts from published statements of economists and others that the small loan business is a retail service business." (Title of person quoted, when given, indicates position at time statement was made.)

Prepared by Leon Henderson.

1. THE SMALL LOAN SITUATION IN NEW JERSEY IN 1929

(Dr. Wilford I. King, Professor of Economics in New York University and Secretary of the American Statis-

tical Association. Published by the New Jersey Lenders' Association.)

“Wholesalers vs. Retailers of Credit. In dealing with the question of rates, one must remember that, in general, the commercial banks are wholesalers of credit, while the Small Loan Companies are retailers of credit. The best evidence available indicates that, on the average, the merchants of the United States engaged in the retail trade sell their goods at 51 per cent above cost, while those selling at wholesale have a corresponding gross margin of but 18 per cent. The ratio of these percentages of profit is roughly three to one. Clearly, retailing requires a much larger rate of profit than does wholesaling.” (Page 73)

2. MASS CREDIT

(Evans Clark, Director, Twentieth Century Fund—November, 1930 issue, Survey Graphic.)

[84a] “In the first place, retail prices are always (99) higher than wholesale. In a sense the small-loan business is retail finance. Dispensing goods or services in small units is always more expensive than in large. The amount of overhead per piece varies inversely with the number of pieces sold at a time. This is as true of dollars as of doughnuts.” (Page 174)

3. CAN CONSUMERS STAND THE TRUTH

(William Trufant Foster, Pollak Foundation, and Member, Consumers Advisory Board, National Recovery Administration.) (Radio address, April 24, 1934. Reprinted by Pollak Foundation for Economic Research.)

“But can consumers stand the truth about rates on small loans? Can they bear up under the news that small loans repayable in monthly installments are necessarily expense loans? The answer is that they already have done so in twenty-six states. They know

that a pound of anything in the corner store cannot be bought at the rate per pound, that Sears Roebuck and Company pays for carload lots. Wholesale Credit comes—when it comes at all—at wholesale rates. Retail Credit comes at retail rates.”

4. THE PERSONAL FINANCE BUSINESS

(Dr. M. R. Neifeld, Statistician, Beneficial Management Corporation. Harper & Bros., 1933.)

“Personal finance is retail banking. The (100) average loan ranges from \$125 to \$160. It takes 20 to 30 minutes to take an adequate application, several hours to make the necessary investigation, and twelve to twenty entries to record payments in ledger-card and customer pass book. If the customer is delinquent for any of the payments—a normal amount of delinquency is an inescapable accompaniment of the business—there [85a] is required a series of form notices, dictated letters, telephone calls and personal calls. Every move adds to the expense. Loans which are mere fraction of the amounts granted by commercial banks, and multitudinous clerical and managerial activities make for the difference between wholesale and retail lending.” (Page 266)

5. USING CONSUMER CREDIT

(A pamphlet issued in 1947 by the National Education Association in its Consumer Education Study series.)

“Likewise some people make consumer credit synonymous with small or ‘retail’ credits, with the idea that business credits are larger or ‘wholesale’. In general, this also is a valid distinction.”

“Even if the hundred-dollar borrower were well known, had an excellent credit standing, and paid off the loan in one lump sum, the cost per dollar of making and administering a loan of this size would be (101) somewhat higher than for a commercial loan. The

difference would represent simply the difference between wholesale and retail costs. For instance, to lend a total of \$10,000 in \$100 amounts would call for a hundred separate transactions, each with its own expenses." (Pages 5 and 16)

6. FACTS YOU SHOULD KNOW ABOUT BORROWING

(A pamphlet issued in 1937 by the Boston Better Business Bureau. Large Loans vs. Small Loans. Cash vs. Installment Buying.)

"The price you must pay to borrow money is of primary concern. It is well, therefore, to understand in the beginning that the rate for a small loan is, of necessity, higher than that charged for a commercial loan by a bank. One reason is that the lenders of large sums wholesale money while the lenders of small sums retail it." (Page 4)

[86a] 7. HANDBOOK FOR INDUSTRIAL FORUMS

(General Federation of Women's Clubs, Division of Industry (1934-1935).)

"Cost of Consumer Credit — Many people have formed the habit of comparing the price of consumer credit with that of commercial credit. But, even for those who bear in mind the important fact that credit to the consumer is retail credit, while that to industry is wholesale credit, there remain many problems. Installment credit is usually offered under terms that conceal its true price. This is true because the public does not understand the need for higher rates on retail than on wholesale credit deals." (Page 2)

8. SURVEY OF PERSONAL FINANCE CONDITIONS IN KANSAS

(Committee in and of Small Litigant, Junior Bar Conference. Published by Junior Bar Conference, American Bar Association (1943-45).)

"The costs of engaging in the business of making

installment consumer loans of \$300.00 and less is greater per loan than the cost of engaging in ordinary commercial banking operations. In one sense of the word, banks are wholesalers of credit, and companies engaged in making installment consumer loans are retailers of credit."

9. WHERE ARE CONSUMER CREDIT COSTS HEADED?

(Dr. Clyde Williams Phelps, Professor of Economics, University of Southern California. Social Science, January, 1951.)

"A relatively high cost is inevitable because of the very nature of such loans. They represent a case in retailing. And retailing in any line, whether in loans or in groceries, costs more per hundred dollars of business [87a] done than does wholesaling in the same line. Moreover, they represent a case of retailing very small amounts (for example \$20, \$30, and up to \$100 or (103) \$150). Such an operation costs more per hundred dollars of business transacted than does retailing larger amounts (for example, the instalment loans ranging from several hundred dollars to several thousand dollars each made by industrial banks or personal loan departments of banks)." (Page 49)

10. PERSONAL FINANCE COMPANIES AND THEIR CREDIT PRACTICE

(National Bureau of Economic Research.)

"The legal rates of charge permitted licensed personal finance lenders are frequently criticized as excessive. Lenders, however, defend these rates on the ground that costs of small loan retailing are high and necessitate legal rates sufficiently large to encourage licensed operation." (Page 134)

11. PAWN SHOPS

(Edmund Mottershead, III, Instructor, New York Uni-

versity. Published in Volume 196 of The Annals of The American Academy of Political and Social Science, March 1938.)

“Essentially, the pledge-lender, with other consumer credit agencies, is a retail merchant of credit, while the commercial bank is a wholesale dealer. For the bank, a loan of one thousand dollars is a trifle; for the pawnbroker, it is very large.

“Assume for the moment that the overhead cost (10¢) per loan is the same for a bank and a small loan company. A loan of \$10,000 would cost the bank, let us say, \$10, while it would cost the small loan dealer \$1,000 to issue one hundred loans of \$100. At six per cent, the [88a] bank would make \$590; the small loan dealer would lose \$400.

“In addition to this overhead-per-loan factor, the small loan company very often operates upon capital borrowed from the bank at the regular commercial rate, while the bank borrows its capital at very low cost. Should the former lend at bank rates, he would suffer a dead loss of all expense above the interest he must pay the bank.” (Pages 150, 159)

These are sample, representative quotations which could be multiplied many times.

[91a] Q. It is possible, is it not, Mr. Henderson, that a commercial bank might make a loan to a commercial finance company or extend a line of credit to a commercial finance company and in turn that that commercial finance company might use the money so borrowed from the commercial bank or from other sources for purposes of financing some other business, isn't that possible?

A. That is.

Q. And isn't it done? I mean that—

A. That is not only possible, but it is done and it is the

same way with the proceeds from the investment bankers or from the insurance companies. When those loans are made to other business organizations, they are using them very frequently for further downstream extensions of credits and loans.

[97a] Q. Now, without going into the Executive Order or Regulation W in any detail, I would like to ask you just a few questions about it.

Q. As a matter of fact, Mr. Henderson, historically that Regulation W continued; did it not, until approximately some time in 1946, was then discontinued, and a different Regulation W was promulgated in 1948, and then again amended in 1951, is that correct?

A. Yes. In those cases it had statutory background, al [98a] though in each case they referred back to the Executive Order for the kind of thing that was expected to be done.

Q. Now, in connection with the original Executive Order and Regulation W, without going into it in detail, that regulation was intended to control consumer credit, in order to curtail or restrict the demand for consumer durable goods, is that correct?

A. That is correct.

Q. And in that connection the original regulations in 1941 did not limit loans, installment loans, of small loan companies, it did not set a limit above a thousand dollars; in other words, (119) only loans of one thousand dollars or less were covered, is that correct?

A. Yes.

Q. And, similarly, in connection with the restrictions on down payments and maximum terms of credit with respect to the listed durable goods articles which are a part of that

order, the Act dealt entirely or, rather, the regulation dealt entirely with sales to the consumer, is that correct, as to those articles?

[99a] A. That is right, and it specifically exempted the loans by the consumer finance type of agency which were made for business purposes.

Q. As a matter of fact, specifically, Section 6 (g) of the original Regulation W definitely excludes from regulation, or exempts from regulation any extension of credit to a dealer in any of the listed articles, whether wholesaler or retailer, to finance the purchase of any such article for resale, is that correct?

A. I believe that is correct. Certainly, it was the intent.

Q. In other words, there was no restriction on purchases or extension of credit to dealers, the restriction was on the buying by the consumer, is that correct?

(120) A. That is correct.

Q. And so far as Regulation W was concerned, you have testified that it regulated and covered the small loan business for the reasons you have already described, and it also regulated, as I understand it, Mr. Henderson, all retail sales, whether they be department store sales or sales of installment furniture, installment jewelry, or installment appliance retail stores?

A. That is correct.

Q. The retail industry, or any phase of the retail trade—talking now of stores selling this type of merchandise who extended credit, were covered and regulated by this particular regulation for the reasons that you have stated, is that correct?

A. That is correct.

Q. Do you know of any wholesale operations which were controlled and regulated by Regulation W?

A. I do not recall any, and I think if we had attempted an—I am volunteering this—there would have been a very

serious protest based on the stated purpose of what the Act was intended to cover, the regulation.

[105a] Q. Mr. Henderson, there was one question that I meant to ask you in conclusion and I am not certain I did, but to be on the safe side I will ask you that again, if I have asked it of you before. On the basis of your testimony thus far would you say that the Lancaster office of Household and Household Discount, making a small installment loans for the purposes and in the manner described in the stipulation and supplemental stipulation of facts is a retail service establishment and is so generally recognized in the financial industry?

A. I would say so.

[107a] Q. Now, Mr. Henderson, I have one more subject that I think we can cover rather rapidly, and that deals with a statement which was made in the report of the House Managers in conference with respect to the 1949 amendments to the Fair Labor Standard Acts, and I would like to direct your attention to this statement from the House Managers' report.

Do you have it available there? I can read it to you. In the course of discussing the amendments with respect to the retail establishment exemption the House Managers, among other things, said this, and I quote:

The amendment does not exempt banks, insurance companies, building and loan associations, credit companies, newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc., because there is no concept of retail selling or servicing in these industries.

Now, directing your attention as an ex- (126-d) pert to the term "credit companies" as used in that report, does that term in your opinion and as it is commonly understood,

namely, the term "credit companies" include organizations like Household Finance or Household Discount or any other organization engaged in the licensed small loan installment business?

[109a] The Witness: Well, my answer is that the term "credit companies," is not commonly understood to include the licensed small loan companies. Now,—

[110a] Q. You have indicated that on the basis of your knowledge and opinion the term "credit companies", apart from [111a] what Congress might or might not have intended, but as a term of economic or general usage, does not include the small loan business. Now, may I ask you, Mr. Henderson, what in the business world or the financial world or among economists generally the term "credit company" means? Or does it have any commonly understood or accepted meaning?

A. Well, I would say—again referring to my intensive participation in this—that it meant the (129) commercial credit companies. I think I referred to them as the commercial finance companies—those that were making credit or loans available to business establishments.

[112a] Q. Well, now, aside from your own opinion to which you have just testified, Mr. Henderson, is there a standard, accepted Encyclopedia of Banking and Finance which defines various terms in the banking and finance field?

A. Yes, there is the Encyclopedia of Banking and Finance.

Q. In other words, there is an Encyclopedia of Banking and Finance which is accepted generally as a standard text for definition in the field, is that correct?

A. Yes.

Q. Have you examined that particular book to ascertain

how that defines credit companies? And if so, tell us what you found.

(131) A. Well, I have here—I don't have the actual Encyclopedia, but the term under the caption "Credit Company", it says, "See Commercial Credit Companies."

And under "Commercial Credit", it says:

"(1) A term used to indicate credit furnished to manufacturers, wholesalers, jobbers, and retailers—those engaged in the manufacture and distribution of commodities. Commercial credit is distinguished from personal, banking, public, agricultural, and investment credit."

Q. And then it proceeds to define, does it not, commercial credit companies?

A. Yes, and it says:

"COMMERCIAL CREDIT COMPANIES"

Concerns also sometimes known as credit or finance companies; engaged in the business of lending on or buying and collecting installment contracts and open book accounts [113a] from manufacturers and merchants. These companies themselves are often substantial borrowers from banks, although their paper itself is not eligible paper within the meaning of Regulation A of the Board of Governors of the Federal Reserve System."

(132) Q. And the scope of those definitions you read, as I understand your testimony, definitely does not include small loan companies, is that correct?

A. That is right, there is a separate category for "Personal Loan Company", and also one for "Instalment Sales".

Q. In the same Encyclopedia of Banking—

A. In the same Encyclopedia of Banking.

(133) CROSS-EXAMINATION.

[136a] X-Q. Does Regulation W speak in terms of retail?

A. It speaks all the way through in terms of consumption loans.

Now, a consumer does not deal at wholesale. A consumer deals at retail, of course.

[155a] ELMER E. SCHMUS, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

BY MR. ZORN.

Q. Mr. Schmus, you are the cashier and a senior vice president of the First National Bank of Chicago; is that correct?

A. That is right.

Q. You are also a member of the Trust Investment Committee of the bank and treasurer of the bank's pension funds?

A. That is true.

Q. The First National Bank of Chicago is a national bank, is it not, established in 1863?

A. That is right.

Q. Being the eighth national bank chartered?

A. Yes; it received charter No. 8.

Q. And the seventh largest bank in the country with respect to deposits?

A. As of December 31st,

Q. Since 1940, you have been, have you not, the senior officer in charge of a division of the First National Bank (191) known as Division D, which division specializes, [156a] among other things, in loans or extensions of credit to the so-called installment finance business or field; is that correct?

A. That is right.

[157a] (193) Q. Is it fair to say, Mr. Schmus, that your bank, the First National Bank of Chicago, operating or

making this type of loan under the division which you head up and have headed up since 1940, is the dominant commercial bank in this country in making loans to the installment finance field?

A. Yes, I believe that to be true.

Q. Would you give us some idea of the size of those loans?

A. We have line commitments at the present time aggregating about 150 million dollars, that is, to the finance industry. There may be other banks, maybe one, possibly two New York banks, that may exceed that amount, largely by reason of the fact that they have larger legal limits than we do, but in the number of accounts that we service, I would say that we were the largest participant in that particular field.

Q. And the types of organizations you are referring to with respect to your total loan commitments in this installment finance field are small loan companies, commercial credit companies, or commercial finance companies and sales financing companies; is that right?

A. That is right.

Q. Could you give us an approximate idea, percentage-wise, of how that 150 million dollars of credit breaks down?
[158a] (194) A. I would say that approximately 25 to 30 per cent were to the small loan companies, about 5 per cent to the so-called commercial finance companies, and the balance, roughly about 65 per cent, to the installment sales finance companies.

(195) Q. And so far as your bank is concerned, within your bank—we have just been talking about how you compare with other banks, but even within your own bank are your commitments to the installment finance group larger than those to any other business or industry, or related industry to which your bank extends lines of credit or makes loans?

A. That is true.

Q. Next in line would be oil, is that correct?

A. Next in line would be oils; probably the meat packers.

Q. I don't know, Mr. Schmus, would it be immodest from what I have learned about you to say that you are regarded among the commercial bankers of the country as the dean in terms of experience and knowledge of the installment finance field, including the small loan field.

[159a] A. Well, sometimes I am a little resentful of that because that connotes age, but the actual fact is, yes.

Q. Well, actually, it is a fact—go right ahead, sir.

A. The banks do recognize the bank and possibly me also as the dean of the lenders to the finance industry.

Q. And, as a matter of fact, you are consulted from time to time by other commercial banks,—

A. A great deal.

Q. —by people in the finance field and by others with respect to problems of the small loan field and the related sales finance field, is that correct?

A. That is right.

Q. And since 1928, when you have been actively engaged in the work which you have described, you have, have you not, become familiar with the nature and prob- (197) lems of the small loan business as well as the other related installment finance businesses?

A. Yes, sir, I feel that I have.

[161a] Q. Is your opinion the same as that testified to by Mr. Henderson with respect to the nature or scope of the small loan installment business,—

A. Yes.

Q. In general terms?

A. Yes, it is.

Q. Do you in your opinion consider the small loan busi-

ness as you know it as a separate industry or as a part of a larger industry?

A. It is a part of a larger industry.

Q. And in what industry, in your opinion,—
[162a] A. The financial industry.

Q. —does it fit?

(201) A. The financial industry.

[170a] Q. Now, there has been discussion in this case, Mr. Schmus, as to whether or not the act of extending credit, namely, the transaction of extending credit or lending money, constitutes a sale or a service. * * * On the basis of your very wide range of experience with all aspects of this financial industry, what would you say about that?

A. Well, I regard that as a service, just as I would (213) regard the commercial loans or loans to commerce and industry.

Q. Have you ever heard any opinion whatever in all of your experience with all of the groups and people in the various operations of the financial industry to indicate that the loan transaction or the credit extension transaction as such is not regarded as a service?

A. That is right.

Q. You have never heard that?

A. I have never heard that.

Q. So that your opinion coincides with all of the other opinions in the industry with which you are familiar?

A. That is true.

Q. Now, in the banking and financial industry is there a definite recognition between the performance or rendering of a wholesale service as distinguished from a retail service?

A. Oh, yes, definitely so. You are speaking of—

Q. To your knowledge—

A. —the installment field?

Q. Well, to your knowledge has such a distinction existed

and been recognized in the financial industry, all phases of which, the contact with which you have (214) described here? Has that been recognized over the years—

[171a] A. Yes.

Q. —as a distinction?

A. Yes, it has.

[172a] Q. All right. Now, which of these organizations would you then say are recognized in the financial industry as performing retail service? You have given us the whole-sale?

A. Well, the retail people, of course, would be the credit unions, it would be the installment sale companies; that is predominantly retail by reason of the fact that my figures, made up of ratios derived from statements submitted by companies doing about 75% of the business, indicate that about 14% of their volume, or outstandings, rather, is in wholesale paper. Now, they are predominantly, as those figures indicate, retailers.

Now, of course, they do also have some capital loans, capital loans made for the purpose of (217) enabling the dealer to erect a new showroom or something of that sort, but that really is a rather negligible amount.

Of course, you have the small loan companies or personal loan companies.

Q. And would the operations of a small loan company—and let's be a little specific about it, take the Lancaster office of Household Finance and Household Discount, as described in the stipulation that you read, would you say that that is recognized in the industry as exclusively a retail service, or something else?

A. No, exclusively retail.

Q. Has there ever been a difference of opinion that you are familiar with among the people in the financial indus-

[173a] try, including commercial bankers and men in in-

vestment houses, men in these various commercial and finance companies and people in the small loan business itself, as to whether or not that business is performing a retail service function?

A. Well, there has been a general opinion that that has been a retail operation.

BY THE COURT:

Q. Well, up to 1949 what would be the occasion which (218) would make it of any importance to determine whether small loans were retail or wholesale? I mean, I can understand they might talk about it, it might sound all right to call them one or the other, but I just wonder whether there was any occasion which made any real difference.

A. Well, we have referred—

Q. It makes a lot of difference after '49.

A. We referred to such loans, for example, that we made to commerce and industry as wholesale loans always, and when we made advances to individuals in smaller amounts, and large groups, we referred to that as retail business or retail loans. There was for a great many years, and ever since I can remember, at least, the distinction in the automobile sales finance field between retail and wholesale; and under wholesale, I described before, were advances made for the purpose of carrying the cars bought from the manufacturer. So that has been a common expression over a period of a great many years.

[175a] Q. Well, now, on the basis of this very wide and vast experience, Mr. Schmus, and having read the stipulation of [176a] facts in this case, would you say in your opinion that the Lancaster office of Household and Household Discount companies making the small installment loans for the purpose and in the manner described in the stipulation and the supplemental stipulation of fact, is a retail

service establishment and is so recognized in the financial industry?

A. Yes, I would.

Q. Well, now, you were present, I know, Mr. Schmus, when I asked Mr. Henderson some questions about what (222) the terms "credit company" meant. On the basis of your very wide experience in this entire field I would like to ask you also whether or not the term "credit company" or "credit companies" has any commonly accepted meaning in the financial industry.

A. It is not a term that is used in the banking fraternity. I don't think it is, frankly, quite as descriptive as it might possibly be.

—To my way of thinking, at least, it would refer to the commercial finance companies as being credit companies. I think probably the best example of that would be the Commercial Credit Company, which I happen to know a great deal about because we were one of the first companies to ever lend that company. That company started out as a commercial finance company, they made loans on accounts receivable, purchased accounts receivable, and did a regular commercial finance operation, and I think that is where they got that name, Commercial Credit Company.

Q. In other words, you were referring there to business financing—

A. Business financing.

Q. —as distinguished from consumer financing?

A. That is right.

(223) Q. So you say your understanding of the term as you know it or have heard it, even though not generally used, is that it refers to these commercial finance or commercial credit companies?

[177a] A. That is true.

Q. Have you ever understood or heard in all your vast experience the term "credit companies" as being applied to

and descriptive of small, licensed, small loan companies?

A. No.

[178a] Q. Now, I wanted to ask you, taking them group by group, whether or not the people who engage in commercial credit transactions, the so-called, you have described them as the wholesalers,—

A. That is right.

Q. —apart from the banks, also have recognized over the years that the small loan business performs a retail function,—

A. That is right.

Q. —and is recognized as such by them?

A. That is true.

(226) Q. So that of any and all of the groups in the entire financial industry or community with whom you have dealt over the years, has there been any disagreement of any kind, or any different view other than the view that the small loan business, is engaged in the performance of a retail function—

A. No.

Q. —and retail service?

A. There has been no different view.

[183a] CROSS EXAMINATION.

BY MR. VOTAW:

[193a] X-Q. As to what institution in the finance field is there any necessity for classifying their loans as either wholesale or retail?

A. Well, there are many institutions in the banking fraternity that have occasion and need to classify their loans, the difference between their loans, as wholesale and

[194a] retail.

BY THE COURT:

X-Q. What would be the need with any financial institution? Why would they have to have that classification? What good would it do? What could be gained by making that classification?

A. Because it is a highly specialized business, this (251) business of making loans, small loans to individuals or the purchase of contracts from automobile dealers. It is a highly specialized loan and I think you will find that every bank that participates in that field has a separate and distinct department for that particular kind of operation, and that is what they refer to and is commonly known as the retail business. That is entirely different and separate and distinct from the loans, as I said before, to commerce and industry.

BY MR. VOTAW:

X-Q. It is purely for their own information, then, that they separate it?

A. That is because that is the accepted classification of that type of advance.

X-Q. What is the purpose of that classification?

A. As I said before, because it is highly specialized. It [195a] is a highly specialized line. You will find an entirely different type of individual handling consumer credit than would be handling or making loans in the so-called commercial department.

X-Q. So the purpose of this classification, then, is so that (252) the customer who comes in will be directed to the type of individual who can deal with that customer?

A. That is true.

X-Q. And is that the sole purpose of determining what kind of loan the customer is going to make?

A. No, I wouldn't say that that was the sole purpose.

X-Q. What other purposes than determining who shall deal with them is gained by this distinction?

A. Your other purpose, of course, is that you have men qualified to make personal loans, or men who are qualified to contact dealers for the purpose of purchasing those contracts generated through the sale of merchandise. It isn't just for the purpose of directing people to go to a certain department.

X-Q. And a person who is qualified to purchase paper from a dealer would not be qualified to deal with an individual who wanted to buy his own car?

A. I think that that is true. Not having a personal loan operation, I am not fully conversant with that, but I am inclined to believe that that is true. At least I find that among the sales finance companies. The contact man with the dealer is not the same type of individual that makes direct loans.

X-Q. So it is necessary or helpful to classify the loans in order to determine who shall deal with the person coming in?

(253) A. Yes.

COURT'S EXHIBIT 2.

[218a] JOSEPH P. DREIBELBIS, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

[219a] "J. P. DREIBELBIS

1. *Qualifications as Expert*

(a) Legal background.

1922 University of Texas, L. L.B.

1922-1924 Assistant City Attorney, Dallas, Texas.

1924-1927 Assistant Counsel, Federal Reserve Bank, Dallas, Texas

1927-1936 Associate and Partner of Locke, Locke, (285) Stroud & Randolph, Dallas, Texas.

3/32 to 2/33 Special Counsel RFC (in connection with Insolvent Bank Division).

2/33 to 3/33 Special Counsel, Comptroller of Currency, handling legal and policy questions in connection with various State bank holidays.

3/33 to 9/33 Special Counsel, Comptroller of Currency (in charge of reorganization of national banks under Emergency Banking Act) in connection with National Bank Holiday.

1936-1942 Assistant General Counsel, Board of Governors of Federal Reserve System, including among many other matters, the preparation for the Federal Reserve Board of Executive Order #8843 of August 9, 1941, dealing with Regulation of consumer credit and of Regulation W issued pursuant thereto; Assistant General Counsel, Federal Open Market Committee of the Federal Reserve System.

1942-3-45 General Attorney, Board of Governors of Federal Reserve System, General Counsel, Federal Open Market Committee of the (286) Reserve System.

3-45 to present Vice President and Head of Banking Department, Bankers Trust Company, New York.

[222a] Q. And, so that, in the course of your discussions, you included within your discussions people in the so-called (286) traditional retail trade, like people representing department stores and appliance retail stores and retail furnishings stores and similar retail store credit organizations, is that right?

A. That is right, and this was the first venture of the Federal Reserve System into this type of regulation—into

the regulation of this type of credit, and I think probably the first time any central banking system endeavored to regular consumer credit as such.

[224a] Q. On the basis of all of your discussions and the part you played in the final drafting of these orders, can you tell us the basis for the inclusion of small loan companies [225a] within Regulation W with respect to their relationship to the purposes of that order?

A. Well, maybe it would be better if I gave a little background.

Q. Go right ahead, sir.

(293) A. How the Executive Order and Regulation came into existence. The order itself states the purposes. But early in 1941, as I recall, General Knudsen issued a directive to the automobile manufacturers requiring them to cut the production of passenger automobiles by 20 per cent. Some of the manufacturers made representations to the Board that they did not object to the 20 per cent reduction and felt that that was in the public interest. There was a great shortage of metals at the time and we were well into the defense program. But they represented to the Board that at that time the average length of payments of the average loan for the purpose of an automobile was about 24 months and that if that period was shortened and if the down payment was raised, automatically you would dampen the demand for automobiles; and they went so far as to tell us how many months' shortening it would take to dampen the demand for automobiles by 20 per cent. I do not recall that figure.

The Board was satisfied that that was a fact and as a result was searching for means by which they could control this credit and regulate that credit which would in turn reduce the demand for consumer goods that used materials in short supply.

And, of course, as a by-product to it, it also had the effect of reducing bank credit and the total of (294) deposits in the banking system, which was an inflationary factor at the time, and it also had the by-product of building up a backlog against possible war demand.

Q. So that in view of those objectives, as I understand it, the order was directed at retail sales institutions which sold [226a] on a credit basis and was directed at small loan companies because, as I understand your testimony, the funds obtained on small loans might have been used by individuals to acquire some of these consumer goods in lieu of getting credit from the stores.

A. (Nods affirmatively.)

Q. And also included the sales finance companies in what has been described here as the retail nature of the sales finance company operation—

A. That is correct.

[228a] Q. As a matter of fact, as head of the banking department, you are in charge of all commercial loans and you are also in charge of personal loan department of your bank, is that correct?

A. That is correct; yes, sir.

Q. And you testified to your knowledge of the small loan business?

A. Yes.

Q. Now, I will ask you again the question that I asked you before, whether your opinion, based upon your experience, would be similar to that testified here by Mr. Henderson and Mr. Schmus, that the licensed small loan business, as you know it, is part of the financial industry and is not a separate industry of itself.

A. That is correct.

[229a] Q. And would your opinion based on your experi-

ence be the same as testified to here by Mr. Henderson and Mr. Schmus, that there is an established recognition in the financial industry of wholesale and retail credit?

A. There is.

[234a] Q. Well, now, based on your experience would you consider the personal loan department of your bank, or rather, the installment loan department of your bank, as you have described it, as being engaged in the sale (308) of a wholesale or a retail service?

A. Retail?

BY THE COURT:

Q. Do you consider it selling service, to begin with?

A. Yes, sir.

[235a] BY THE COURT:

Q. Is it a wholesale or retail service? You can answer that.

A. Retail service.

[237a] Q. On the basis of your familiarity with the small loan [238a] business and with the concepts or opinions held in the industry as to the nature of their operation, would you say that the operation of a small loan office as described in the stipulation in this case is recognized in the financial industry as selling a retail service,—

A. It is.

Q. —or as the retail sale of a service?

A. It is.

Q. In your opinion, Mr. Dreibelbis, is the Lancaster office of Household and Household Discount, making small (313) loans for the purposes and in the manner described in the stipulation of facts and supplemental stipulation of facts in this case, a retail service establishment, and is it so recognized in the financial industry.

[239a] A. Yes.

[251a] DAVID C. MELNICOFF, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

[267a] Q. Mr. Melnicoff, are such loan companies as Household Consumer and Discount credit companies?

A. I do not—I do not recognize the term “credit companies” as being one that is in general use, and I would have to know the context that is presented in order to come to any judgment on that.

[269a] (356) **CROSS-EXAMINATION.**

X-Q. Mr. Melnicoff, this is not intended at all to reflect on you in any way at all but as I look at your statement of qualifications, you have never been engaged in the banking field or the general financial industry in any way whatsoever except through your services with the Federal Reserve Bank; is that correct?

A. Yes.

X-Q. In other words, you have never been either an economist advising the small loan business, nor have you been engaged in the small loan business, nor have you personally been engaged as such in any aspects of the financial industry as we have described it here?

A. Only as the Federal Reserve Bank is associated with those activities.

X-Q. And in connection with your knowledge of the small loan business, my understanding was (and correct me if I am in error) that you are presently head of the Department of Selective Credit Regulations of the Federal Reserve Bank.

of Philadelphia, dealing with the administration and enforcement of what is the current Regulation W.

A. Yes, that is correct.

(357) X-Q. How long have you been in that particular position?

A. Somewhat over a year.

X-Q. Somewhat over a year. And your testimony, then, with respect to your knowledge of the small loan business, as I understand it (and again correct me if I am in error), [270a] was that your investigators working under you made various studies and reports with respect to small loan companies within the jurisdiction of the Philadelphia Board, and in connection with those reports discussed problems of the small loan business with small loan people and, in turn, reported those to you, and that on occasion you yourself have had occasion to discuss problems with people in the small loan business.

A. That is right. I would say my experience or knowledge of the small loan industry certainly extends beyond my experience in the present position. Obviously, I would not have assumed that position without some previous knowledge, not gained first-hand, but some general knowledge of the economics of the industry and of institutions and practices in it, gained again in an academic way; also through discussions with bankers and my general activities at the Federal Reserve Bank.

X-Q. Have you ever written any articles for publication dealing with the small loan business, or with any of the other (358) aspects or organizations in the financial industry?

A. Well, I have written an article that I recall specifically relating to certain aspects of the real estate industry, which may be part of it. I have written articles dealing mainly with Regulation W or selective credit regulations, which did not have as their main point the discussion of institu-

tions or the description of institutions in the industry but which were related to it.

X-Q. You have not, then, as I understand it, written any articles directed particularly or primarily to the nature of the small loan business or to any consideration whatever as to whether or not it is engaged in a retailing or a wholesaling function?

A. No, and certainly I have never had occasion before this to consider the latter question.

[271a] X-Q. So far as commercial banks are concerned, as I understand your testimony, you have never written any articles which dealt directly with the problem as to the nature of the lending function of commercial banks, as to whether that constituted service or whether it was a wholesale service or retail service. You have written no articles directed to that subject?

A. No; as I say, the problem is a new one to me, that particular problem.

(359) X-Q. And you have not, have you, discussed with commercial bankers, people in the insurance field, people in the commercial finance business, either directly with individuals or in connection with trade association activities of these various organizations—you have never discussed, have you, the problem with any of those people as to whether or not the lending function constituted a service or whether or not some aspects of it, depending upon the organization, were wholesale and some retail?

A. You will forgive me if I make what may seem to be a facetious reply, but when I first heard this question, it occurred to me as one that was not relevant to anything particularly and rather on tenuous ground, and so of course it never would occur to me to have discussed that particular subject specifically before I heard of this matter.

[304a] (411) CHARLES R. WHITTLESEY, having been duly sworn, was examined and testified as follows:

(The statement of qualifications of the witness is as follows:

STATEMENT OF QUALIFICATIONS.

Whittlesey, Charles R. (A.B., A.M., Ph.D.)

Professor of Finance and Economics and Chairman of the Department of Finance, Wharton School of Commerce and Finance, University of Pennsylvania.

Economist, the Penn Mutual Life Insurance Co., Philadelphia.

(412) Formerly Economist, the Fidelity-Philadelphia Trust Co., Philadelphia.

Adviser on Economics, The W. W. Norton Publishing Co., New York.

[305a] Formerly Special Consultant on Banking, Credit and Insurance for The American College Dictionary.

Formerly on staff of the National Bureau of Economic Research, New York.

Author:

Books (6) including:

International Monetary Issues, McGraw-Hill, 1936.

Principles and Practices of Money and Banking, MacMillan, 1948.

Readings in Money and Banking, Norton, 1952.

Monographs including:

Banking under the New Deal, U. of Chicago Press, 1935.

Money and Banking in Wartime, N. B. E. R., 1942.

Bank Liquidity and the War, N. B. E. R., 1945.

(413) Articles (numerous) in:

Encyclopedia Britannica, Encyclopedia of the Social Sciences, American Economic Review, Quarterly Jour-

nal of Economics, Economic Journal, Journal of Political Economy.)

BY MR. WEINER:

Q. Now, Professor Whittlesey, have you read the stipulation and the supplementary stipulation which was filed in this case?

A. I have.

Q. And you are acquainted therefrom with the operation of the Lancaster office of the Household Finance Corporation and the Household Consumer Discount Company, defendant corporations?

A. Yes, that is correct.

Q. Yes. You heard me present the issue in this part of the case to Mr. Melnicoff, who has just completed his testimony, and you heard the three questions which I presented [306a] to Mr. Melnicoff. Are you in agreement with the answers given to those questions by Mr. Melnicoff?

A. I am.

(414) Q. And, Professor Whittlesey, I understand that you would like to clarify and further explain your last answer. Will you proceed?

A. I have a few supplementary observations that might help to elaborate or bring out additional points.

He referred to the matter of classifications. I would like to call attention to one minor item of evidence which is close to me and I think of some interest as reflecting traditional attitudes on this subject. It is that at institutions of business throughout the country, of advanced education, such as the Wharton School, it is customary to teach Retailing in the Department of Marketing.

(415) It is customary to teach about finance companies, personal finance companies in Department of Finance. That is the situation at the Wharton School.

So far as I know, there is no discussion of finance companies in the Marketing Department. There is no retailing

with us. One of the professors in the Department of Marketing has written a book on Retail Installment Selling, in which he barely mentions personal finance companies, and then only as an auxiliary to retail selling.

I may say that in discussing personal finance companies they are often treated, and they are in one of our courses, along with the discussion of other financial institutions, such as building and loan associations and commercial banks.

I would like to turn to another point that strikes me as important to this whole testimony as I have listened to it today. It is the distinction between what is recognized traditionally, generally and officially—officially as shown by these classifications and the documents we have heard about, and popularly as well—to be retailing, and that which is perhaps capable of being construed ultimately or the- [307a] retically (416) or in some supplementary or additional way as retailing, as a further refinement.

This Exhibit 2 was brought to my attention. I found it very interesting and I will be very glad to discuss it further later on, but there was one point that came to my attention particularly; it is the eighth selection of Exhibit 2, where the final selection in the quotation is:

“The costs of engaging in the business of making installment consumer loans of \$300.00 and less is greater per loan than the cost of engaging in ordinary commercial banking operations. In one sense of the word, banks are wholesalers of credit, and companies engaged in making installment consumer loans are retailers of credit.”

Now, I attach considerable importance to that qualifying clause, “in one sense of the word”—no question about it—that that one sense was obviously so untraditional, if I may say so, that you had to call particular attention to the fact that there was this addition and unusual use that might be applied to it.

I read with considerable interest an (417) article by

Mr. Henderson—not knowing that he was going to be here: and I must, if I may, pay tribute to Mr. Henderson, I have the most profound respect for the services he has done for society as well as to this industry in the past. That is not to say that I agree with the position he is taking at the present moment.

In this article referred to in the testimony, published in the Journal of Business sometime in the 1930's, there was a sentence as follows:

“In the last analysis the specialized financial agency making small loans is doing a retail business.”

Now, you see, the word is “in the last analysis”, ultimately. Now, “in the last analysis” implies that there are a whole lot of terms that go ahead of that, and I take it that I personally am perfectly willing to admit much that [308a] has been said this afternoon, but I would call attention to the fact that it could still be quite true, without disposing of the fact that the other type of meanings that we have been speaking about here are the more traditional and are in the first and second and third and fourth analysis, before you get to that last analysis or to the ultimate.

(418) May I take the time of the Court to comment on an analogy that I think is helpful? It is true that one can find many illustrations, and I could have given you some additional ones—be glad to if you ever want them—of cases where the expression “retail credit” is applied to personal finance companies, although I was very much surprised and amused, I don't apologize at all to gather that perhaps I have used it myself, I have no doubt I have, and in my instruction, I am sure, because at Wharton we try to teach in the first and in the second and in the ultimate as well, and so, naturally, we presumably refer to this ultimate sense in which you might use it. The comparison I would like to offer is the use economists, theorists, often have made of the word “rent”.

A. It runs through many of the most familiar and distinguished books on economic theory that we have, the concept of rent where that is stretched to include the payment not just for land or buildings, but also for exceptional ability, as the extra, the high compensation that a singer or a lawyer gets or any (419) other individual who has extremely high capacity and ability. Now, that is often called "rent", it is spoken of in Marshall as producer's rent—the famous English economist, certainly one of the classics in [309a] economic literature, "Principles of Economics"—and it has been repeated in many, many other books, text and others.

Now, we might apply that here and might bring out that that would lead to the suggestion that lawyers for both sides are undoubtedly receiving rent, they are rent takers, they are landlords, and this afternoon Household is renting some lawyers and so is the Government.

Now, I submit that that is a perfectly useful and revealing thought, it is enlightening to look at it that way. But that does not mean that in current and traditional usage that is what it means to most people. And I would like to summarize and make this as short as possible by saying that whatever the ultimate validity of the use, it would not represent the traditional and the current and the popular usage. The use in this connection of rent, the use as I feel sure in my own case of "retail credit", as applied here, and the other cases that have been cited, is an (420) expository, pedagogic character, and very useful, but it is not as a title, not as the title of an operation.

Also, as another observation I would like to call attention to the tendency to use "Wholesale" and "Retail"—we get tired of repeating those terms, we get tired of repeating terms over and over, so we often substitute the words, and this is an example, by the way, where we really mean

"large" and "small". Mr. Melnicoff gave one illustration, and one might also speak of the wholesale loss of life in an earthquake, wholesale damage done by the recent storm. The use in the—

[310a] Q. I mean, the terms.

A. All-right. Now, I submit that that is a perfectly legitimate use, but that it is not used in the sense that one thinks of it in using it as a classification in industry or something of that sort.

Q. I suppose you might differentiate between police (421) courts and appellate courts on the question of whether they are wholesale or retail. I don't know, I don't suppose it would metaphorically or figuratively.

A. It would serve the same purpose, of interesting and amusing people.

(422) Q. Yes.

A. —that this use here serves, and it would provide variety, which is, after all, full of spice.

Now, in these quotations that I have read in Exhibit 2 I performed a little exercise, I went through and substituted the word "large" or "small" when they had used "wholesale" and "retail", and it makes just as good sense, and it seems to me that the quotations there demonstrate that charges are lower and prices are lower where sales are on a large scale basis, and that they are higher where sales are on a small scale basis, and that, then, does not prove a question of things being wholesale and retail, it proves that prices are different whether they are small or large, and that goes within the retail industry; you can buy a lot at retail at the A. & P. which is certain retail, and get a lower price for it, or a cooperative or any other place, if you buy larger lots.

Now, the distinction is between large and small, and I suspect that in many of these things which we seem to be

troubling ourselves about, it is either used figuratively—and in that view you are justified, in a pedagogical sense—or it is to be (423) used as a substitute for “large” and “small”, and if that is the matter at issue I will leave it at that.

[311a] (424) I was going to say that the differences demonstrate the small character of these operations; it doesn't seem to me that those differences demonstrate the retail character.

Now, there is just one final point. I hope that my friend, Mr. Henderson, won't take this to heart—I paid him the compliment of going back and reading some of the things that he had written before and I surmise that I have been paid the same compliment.

I would like to read the rest of the paragraph, all but the last sentence which would take more time, the paragraph from which the quotation in the brief was included. It embraces that sentence that I quoted a moment ago. The first sentence that precedes that is this:

“No sooner, however”—this article is 1931. I will give you the reference later to it—“No sooner, however, does the state give its sanctions to credit unions than it begins to nibble at their prerogatives and to impose restrictions and regulations that would be hotly resented and vigorously resisted by any other retail business,” and then, this sentence that I read before, “In the last analysis, the specialized financial agency making small loans is doing a retail business.”

Then it goes on to say, “Some of the (425) legislative mandates prescribe the type of group which may apply for a charter, the period of repayment of loans, the size of loans, the amount to be set aside for bad debts, circumstances under which officers may be compensated, etc. In one state, all associations, through operating legally, are required to apply for charters if the business approximates

that of a credit union. With such legislative encouragement, it is not surprising that state supervising officials feel authorized in some cases to criticize business policies, object to rates of interest paid on deposits, object to appointment of certain officers, and in general participate by veto power in the business affairs of these associations."

The fact that this referred to credit unions doesn't impair [312a] the validity of it; it is equally applicable. I don't want to do any more than just mention that it did refer to another type of business, but it is equally applicable here, I feel sure.

But it seems to me that this quotation, taken together, brings out a very important point. It shows that state legislatures who surely reflect to some extent public opinion, traditional conceptions, completely repudiate the alleged similarity applying rules and restrictions in this business which are absolutely foreign to retail business, but, (426) mark you, that are closely similar to those which apply to banking.

So they by this, and this quotation brings it out, make this something that is like banking but not something that is like retailing.

"Such regulations as are mentioned are inconceivable in the retail business." Nobody objects, so far as I know, to the fact that—they may object to the amount but they don't object to the principle of imposing a limit on the loans made by these companies. But who would think of doing that to a grocery store or retail establishment?

Now, that very difference in policy seems to me to reflect a fundamental difference in our whole attitude toward these and the ordinary retail business. And the curious thing about it is that the principle is not challenged in the case of finance companies. It seems to me that that is a recognition of the distinction between retailing and this type of business and at the same time the similarity that it possesses with respect to banking.

Q. Professor Whittlesey, would you say that such loan companies as Household Finance, Household Consumer Discount Company, are credit companies?

A. I should. I hope you are not bringing up a technical classification—credit companies—

(427) Q. No. I am speaking generally.

A. If you are speaking in a general term of a company [313a] that is in the business of merchandising credit, if you are, they obviously are, it seems to me, as is any other business that deals primarily in credit.

CROSS-EXAMINATION.

[315a] BY MR. ZORN:

X-Q. As I understood your testimony yesterday, your opinion, with respect to the proposition that the small loan business was not engaged in retailing, as you understand retailing, was predicated upon your concept, which you stated, that you regard as retailing or as a retail establishment that which is traditionally recognized and by popular and current usage gets to be retail, is that correct?

A. Well, I think that is too simple. The case was mentioned of crematories the other day; I don't think that most people would say, if you stopped and asked them if that is a retail organization, that that was, (434) but, nevertheless, it fits in under the same heading and I think for comparable reasons.

[317a] X-Q. "It is the distinction between what is recognized traditionally, generally and (436) officially—officially as shown by these classifications and the documents we have heard about, and popularly as well—to be retailing, and that which is perhaps capable of being construed ultimately or theoretically or in some supplementary or additional way as retailing, as a further refinement."

And you repeated substantially the same concept later on in your testimony where at page 419 you were talking about—I will give you the entire sentence so that there is no misunderstanding:

“And I would like to summarize and make this as short as possible by saying that whatever the ultimate validity of the use, it would not represent the traditional and the current and the popular usage.”

[318a] So I ask you now, Professor Whittlesey, whether or not your concept or definition as to what constitutes retailing or a retail establishment, as you have testified to it up to now, is not predicated upon what you understand to be the traditional and popular usage of the term.

(437) A. I will admit that there are cases—and in the case of rent, which I mentioned in a different connection yesterday, that is a term that is used in a particular way among economists, and that is perhaps not what it means outside. I won't state that in all cases there are not usages in a particular occupation that are peculiar to that and do not correspond to what is popular and general, and so on; but in this case, for the moment, I am disposed to think—in fact, I do think that it is the same generally within the industry as outside the industry.

X Q. Well, let me make an assumption, Professor Whittlesey, to get this point very clear. Suppose in the trucking industry you had two groups of truckers, one group of truckers which engaged exclusively in the business of moving merchandise to business and industrial firms, and another separate group of truckers who were engaged exclusively in delivering from retail stores to retail customers. Now, would you consider that a local trucker—take the United Parcel operation, I am not now talking of a delivery department of a store, but a local trucker in the trucking industry who makes that kind of delivery— (438) would

you say he was operating a retail establishment or performing a retail service?

A. This is like United Parcel.

X-Q. Parcel.

A. Delivering only to—

X-Q. To the ultimate consumer.

A. I would think you would—he would generally be known as a retail trucker, meaning that he was a trucker for retail dealers. Now, I don't think they would be re-[319a] ferring to his service and describing that as a retail operation.

X-Q. That is my question, Professor Whittlesey.

A. All right.

X-Q. —exactly that.

A. Well, now, I am saying that that would be my interpretation, my expectation, just on general reasoning. If there is some technical, specialized use peculiar to that industry, I would have to know more about the industry and I would have to study it, and I am not at the moment prepared to say—I would be prepared to make a guess, but I would not be prepared to say that I knew just how they speak about it in that particular industry.

(439) X-Q. Well, now, in applying your so-called traditional, popular usage test, you and I can agree very quickly that when you are talking about a local trucker, who is generally classified as being part of the trucking industry, doing, performing or selling the services that I have described, you wouldn't without a great deal more study as to how he was regarded or treated within the trucking industry describe his function as the performance of a retail service, is that correct?

A. I—I am reasonably sure of my ground there. I am less sure than I am in the case, in the other case that I was speaking about, but I admit there are differences, yes, so that—

X-Q. Well—excuse me, sir.

A. All right.

X-Q. Did you want to finish?

A. No, go ahead.

X-Q. So that on this particular proposition, when you have a concept in your mind or express an opinion as to whether a particular firm is a retail firm or is performing or selling a retail service, your primary test is, first, whether or not there is a traditional (440) understanding or a popular or [320a] a current understanding or usage generally, and not limited within the particular industry itself, as to how that particular transaction is regarded.

[321a] “Q. So that on this particular proposition, when you have a concept in your mind or express an opinion as to whether a particular firm is a retail firm or is performing or selling a retail service, your primary test is, first, whether or not there is a traditional understanding or a popular or a current understanding or usage generally, and not limited within the particular industry itself, as to how that particular transaction is regarded.”)

A. You have asked two questions, whether this is general, and whether it is particular to that industry.

BY MR. ZORN:

X-Q. Well, if you want me to break it down—

A. No,—

The Court: No, I think it is all right.

A. —I want to admit, as I admitted all along, that it is conceivable that there could be a difference. I believe that there is no difference in this case, and I would normally assume that there was a sufficient difference, and I believe that a person reasonably familiar with anything that is other than a very (442) technical operation is justified in assuming that there is no conflict.

(443) Now, there may be, and if you want a particular

case, that is a separate question, and if I think I am competent to answer that I will answer it.

BY THE COURT:

X-Q. When you say there is no difference in this case, you are referring to the financial industry—

A. Yes.

[322a] X-Q. —generally.

A. I believe that.

The Court: That is all I wanted to know.

BY MR. ZORN:

X-Q. I am not asking you about the financial industry at the moment, Professor Whittlesey, I am trying to develop with you what I thought we could agree on very quickly, and if you will forget for the moment that I am trying to trap you, or anything of the kind—

A. I am not worried about that.

X-Q. —and just answer the questions—

A. Right.

X-Q. —without regard to anything else which may be in the case, I think we can agree.

A. Go ahead.

(444) X-Q. And my simple proposition is this, that as you have testified, there may be instances where in some other business or industry, or for some other purpose, something might be considered retail or a retail service, but that you in arriving at your opinions would not consider that retail because it did not meet the traditional test which you have laid down here. Now, is that true?

A. I don't see that you asked me anything that I haven't already answered.

(445) BY MR. ZORN:

X-Q. All right, then, let's proceed. I can come back to it in a different way. Perhaps we can agree very quickly on these things. However, there is no question in your mind that an A. & P. food store or a Woolworth store,

located in any particular town or city, is a retail establishment?

[323a] A. That is right.

X-Q. And it would make no difference, would it, Professor Whittlesey, that this particular A. & P. Store is one of a series of several hundred stores operated by the same company?

A. That is correct.

X-Q. And similarly with the Woolworth Store?

A. (Nods affirmatively.)

X-Q. In other words, the fact that a particular retail establishment is part of a national chain or a large chain of similar stores makes no difference whatever in determining whether or not the particular store is a retail establishment?

A. That is right.

X-Q. Now, turning to the Household Lancaster Office, let me ask you whether you would agree with me on the basis of the description of the operations of that office which are set forth in the stipulation which you have read, whether (446) or not the Lancaster Office—and I am not asking you whether it is retail—whether or not the Lancaster Office you would regard as a local office or a local establishment?

A. Yes, it is a local—in the same sense that an A. & P. store is local.

X-Q. Precisely. That is what I was getting at.

And, secondly, would you agree with me that as described in the stipulation the borrowers or the customers who came to the Lancaster Office for the purpose of making a loan were consumers, that is, that they were individuals that you could describe as consumers and were not business organizations or industrial companies?

A. I would think so, in the same sense, likewise, that they are consumers of this financial service, to use the designation you gave it yesterday, as is a building and loan

or an insurance company selling industrial policies and so on.

It is not in the sense that the A. & P. is that it is dealing with commodities which always, it seems to me, tend to [324a] carry the retail inference without dispute. And when it isn't a commodity—if this isn't a commodity—well, then, it is much more confused, less clear-cut.

X-Q. Let's clear that up a moment. You made a reference to insurance companies and building and loan associations. (447) When a real estate construction company goes to the Metropolitan Life Insurance Company for the purpose of making a mortgage loan so that it can construct an office building, would you regard the real estate company as a consumer or as a business enterprise?

A. The test that I was using was relating to the policy sold—I was referring to the other type of business, not what they did with their funds. It is the dealing with the public—

X-Q. I see.

A. —and providing insurance, whether dealing with the ultimate consumer, that establishes the parallel.

X-Q. I see. But, so that we are clear about this, Professor Whittlesey—

A. There may—with respect to the loans—well, there are many types of loans that are made and you would have to—we would have to—be more specific.

X-Q. There is no question whatever you are familiar with the insurance business, I know, because you are adviser for at least one insurance company.

A. Reasonably so.

X-Q. And all I want to ask you about is this: so there is no misunderstanding in this record—

A. Sure.

(448) X-Q. —the functions of insurance companies divide themselves into many categories and one of the major

categories in which insurance companies of the nature of the Metropolitan Life Insurance or Northwestern or Penn Mutual or others engage is the investment function, the investment function divided into loans for real estate purposes [325a] and loans for commercial purposes. That is a big part of the insurance business today, is it not?

A. That is right.

X-Q. And practically all of our major insurance companies engage in that as one of their major activities, that is one function of the business, of the insurance business, is that correct, apart from the sales of policies?

A. Certainly, certainly.

X-Q. Now, the only thing I was concerned about here, without getting into the ramifications of all other forms of industry because if we do we won't be finished by 11:00, the only thing I was concerned about here was whether or not it was your understanding that no matter how you define the transaction which occurs in the Lancaster Office, that nevertheless the customer who comes into that office you would classify as a consumer?

A. I would be—from my knowledge of it, I would say yes.

X-Q. From what is said in the stipulation.

(449) A. All right.

X-Q. And I am limiting you sir, to that and nothing more.

A. To my recollection, that is all right.

X-Q. Now, we have had a little discussion here, Professor Whittlesey, about your concept of retailing, retail establishments or retail sales or services. Could you give us some illustrative ideas—I know you can't be exhaustive in the time we have here—as to generally what types of operations or establishments you include as part of the retail industry or the retail trade.

A. Well, the ones you mentioned, grocery stores and so on, they are—of course, you have this list, we have all seen

it, and I have glanced at it, it is not familiar in my mind, but if my memory were good enough, I would just read that right down; there would be no point in that,—

X-Q. Let me ask you this to save time.

[326a] A. I would like to finish—

X-Q. Go ahead.

A. That list contains some—

X-Q. Which list are you referring to?

A. Of those that are included under the interpretation of the Act.

X-Q. You are referring to the Administrator's list and not to the Industrial Classification of Retail—

(450) A. The first, the Administrator's list.

X-Q. You are referring to the list which is included in the interpretations, this list which I show you here?

A. Well, I haven't seen this list, I have seen another one.

X-Q. Just take a look at it.

A. I can tell in a minute.

Yes, I am pretty sure that is the same one. I am pretty sure that is the same list.

X-Q. I just want to get the record straight. You are referring, Professor Whittlesey, to the list which appears under Section 779.10 of the Interpretative Bulletin, under the general heading "A", "Types of Establishments Whose Sales or Services May Be Recognized As Retail"?

A. I haven't seen it in this form but I assume it is the same.

BY THE COURT:

X-Q. You were going to say something about the list.

A. The thing I wanted to say about it is this, it is important. As I analyze that list, it contains some that are there because the real estate establishments, as generally understood and as I would quickly answer it, and some because they are—

X-Q. You mean "retail." You said "real estate."

A. "Retail," excuse me.

(451) It contains some that I wouldn't think of as retail [327a] establishments. I doubt that people in the street would think of them as there; and that includes the crematoriums and some others. Now, they are there for comparable reasons and I would think valid reasons but it means—

BY MR. ZORN:

X-Q. Excuse me, Professor Whittlesey, I don't like to interrupt you—

A. It means we have—

X-Q. —but I don't think—if you want to express here and you want to go into the legal interpretation of the statute, I will be very happy to discuss that with you—

A. I am not qualified, I don't want to—

X-Q. —but if you are not qualified on that, it would seem to me—

A. Well, I—

X-Q. —that you don't have the economic basis for determining here, have you, as to why these were included?

A. We were discussing—

THE COURT: I think that what he was going to say is proper.

BY MR. ZORN:

X-Q. All right, sir.

A. Well, I will make it very short. It is this, that we (452) are concerned in that list—and if you are asking me about that list I want, before we start—with things that are retail, as I understand it, and, also, that are not generally thought of as retail but that belong there and are put there because they deal primarily with consumers directly, they wouldn't be thought of as retail but they are in that list and it is consistent that they should be.

[328a] Now, there are some others that I think it is harder

to understand. Now, you might say, "Why aren't banking services there?"

It seems to me that that goes back to what Melnicoff said and what I meant to endorse, too, that we are not dealing with simple categories, we are dealing with a number of categories. They include wholesale and retail and they also include banking and financial institutions and they also include service institutions, and I think that you have service institutions and retail in that first list and I think you have some of these others that meet some of those tests in another.

X-Q. Professor Whittlesey, I am inquiring of you as to what your understanding and your basis is for testifying that a certain thing fits into a retail category or it doesn't.

THE COURT: His own retail category.

BY MR. ZORN:

(453) X-Q. In your own retail category, that is what I am interested in.

A. I will be glad to answer that but I want to be clear I am not talking about that list.

X-Q. Now, we both agree and I will go into this in a moment just to check as to some of these things, but your opinion, in other words your concept, of retail is one that is basically predicated on the traditional test which you used and I would like to ask you in that connection, since you have mentioned the word "consumer," and indicated that possibly, though you can't possibly know why the Administrator put them in here, that in your view he might have put them in here because they dealt, some of these things, dealt with the consumer.

Now, in arriving at a test of what you consider a retail [329a] sale or a retail service or a retail establishment, do you also consider the size of the transaction as one of the tests or do you ignore that completely?

A. I would say that generally, certainly on the average,

the wholesale would be larger and the retail would be smaller. But there will be many wholesale transactions that are smaller than many retail transactions.

X-Q. But in arriving—

A. A Cadillac car as an example.

(454) X-Q. Yes, but in arriving at a judgment in your own mind as to whether a particular operation should be classified by you as retail or wholesale, isn't the size of the transaction a factor?

A. Well, they parallel, they are similar. As I said yesterday, often wholesale and retail are loosely used to mean large and small, but that is neither strict nor legitimate, and I repudiate that as synonymous.

X-Q. Well, now—

A. And I will say that they are likely to come together and in general they resemble, but I will not accept size as more than indicative or presumptive or parallel. It is not a test.

X-Q. You would, then, as I understand it, and I want to be very clear about this, Professor Whittlesey, because these are matters of importance in this case: as I understand you, in arriving at an opinion or concept or a definition of a retail establishment, you would repudiate the question of—you would repudiate the factor of—the size of the transaction as having any weight in the determination of whether it was retail or not?

A. As a final test, I repudiate it.

X-Q. As a final test that would be out of the window?

A. As a final test, yes.

(455) X-Q. Now, let me ask you whether in arriving at that same determination you would consider as a factor in [330a] arriving at the judgment the type of customer who is involved? Would that be a test or an important test in determining whether a particular transaction was retail or something else?

A. Yes.

X-Q. So that clearly is a factor.

BY THE COURT:

X-Q. Will you enlarge on that a little?

A. If it is individual or household, a final consumer of that product, I think of it as being—well, I think of retail as being of that character ordinarily. Now, we occasionally buy things at wholesale if we can.

(Laughter.)

X-Q. And sometimes buy too many because of that.

Go right ahead, please.

THE COURT: All right, he has answered it.

MR. ZORN: All right.

BY MR. ZORN:

X-Q. And so that the type of customer—in the case of reaching that determination, you would say that if the customer were the consumer, the ultimate consumer, as distinguished from a business or industrial enterprise, that factor would be important in determining whether the transaction or (456) the establishment was retail? Correct?

A. That is right. It is not the only test, you understand—

X-Q. Not the only—I didn't attempt to imply that. But it is a test?

A. And an important—

[331a] X-Q. But you would say it is an important test?

A. I would say it is more important than size.

X-Q. I understood you eliminated size completely before. Let's be clear about that.

A. Well, as a test, yes, in the same sense I think I am prepared to eliminate it. And I said—and I don't want to be contradicting what I said yesterday—that they tend to parallel.

X-Q. Well, I have asked you and I think we can be clear: I understand you to say, Professor Whittlesey, and I want to be very clear about it, that so far as the size of the

transaction is concerned there may be some parallelism or some other language which you used but, nevertheless, if you had to make a judgment as to whether a particular establishment was retail you would not consider as a factor in arriving at that judgment the size of the transactions involved?

A. I wouldn't stop with that as the test, no. I don't (457) know what you are quite trying to get at. I think I have covered it already.

X-Q. Let's not pursue it any further; I am satisfied with your answer.

A. I wanted to be clear—

X-Q. Yes, I appreciate that you do.

There was one other question I wanted to ask you: would you consider in your own determination as to what constitutes a retail sale the purpose of the sale, namely, apart from the type of customer would in your judgment the fact that the particular purchase was for consumptive, as distinguished from resale, purposes, have any weight or bearing in arriving at a determination?

A. Yes.

X-Q. In other words, then, the nature or type of the customer we agree is important?

A. (Nods affirmatively.)

{332a} X-Q. And the purpose for which the article or the service is to be used is important?—

A. (Nods affirmatively.)

X-Q. —in determining whether or not it meets the retail test which you have described?

A. That is right; used for consumption rather than for the production—

(458) BY THE COURT:

X-Q. Or redistribution.

BY MR. ZORN: ———

X-Q. Or redistribution?

A. Or redistribution.

X-Q. Well, now, I think that we have already agreed that you were not here for the purpose of giving us a legal opinion or a legal interpretation with respect to all of the complexities of this particular law, but I would like to ask you this. It is conceivable, ~~is it not~~, Professor Whittlesey, that for various legislative or regulatory purposes the term "retail" or "retail establishment" might be defined in many ways, in many ways different from the way that you define it? That is conceivable, isn't it?

A. Yes.

X-Q. And let me see whether you would agree with me on certain examples of that. Suppose this particular law had said in specific terms "that the retail service exemption shall include grocery stores and small loan establishments"; there wouldn't be any question, would there, that the word "retail," as used in that connection, would cover us? You would agree to that if the law said that?

A. For the purposes of the law; that is right.

X-Q. And, similarly, if the state banking laws of Pennsylvania [333a] (459) or any other state specifically define a bank or a banking institution to include a retail charge credit store, that is, a store like a department store extending credit, or any of the credit installment retail stores; now, if a state statute specifically defined those and put them under the jurisdiction and supervision of the State Banking Department, for the purposes of that statute that store would become a banking institution as defined in the statute; that is conceivable, isn't it?

A. Yes.

X-Q. But, nevertheless, that wouldn't alter your opinion whatever that a retail store is not a bank? You wouldn't say that by reason of that particular statutory definition a retail store therefore becomes a banking institution?

A. For purposes other than the law in this case?

X-Q. That is right, of that specific law.

A. That is right.

X-Q. So that your concept of a retail store, as you have described it here, would not be affected by any particular legislation having particular purposes and having particular definitions, is that correct?

A. Yes. In other words, what we have been talking about earlier was any definition and my understanding; now you are—

X-Q. Exactly—

(460) A. —now you are talking about classifications that are by law.

X-Q. And I would like to ask you one more illustration along that very line, and these are assumptions and I just want your opinion with respect to these assumptions.

If you had a state or a local tax law, a use or occupancy law, for example, which said "that there shall be a retail tax of "X" dollars or "X" percentage and there shall be a wholesale tax of "X" percentage, and for the purposes of this law we define any business organization or establishment [334a] whose annual total volume of sales is less than a hundred thousand dollars as a retail establishment and any establishment no matter in what form of activity it is engaged whose total annual volume of sales exceeds a hundred thousand dollars as a wholesale establishment for the purposes of that statute," a bank or any other commercial enterprise would be classified in its particular category of retail or wholesale regardless of whether or not it met a traditional test, isn't that—

MR. WEINER: Isn't that a legal conclusion, Your Honor, that he is asking this witness to draw?

THE COURT: Well, I certainly don't—I certainly wouldn't accept it as binding.

THE WITNESS: But—

(461) **THE COURT:** But it is proper enough to test his—Mr. Zorn is making a state of facts, and he can—

THE WITNESS: I am prepared to answer it.

THE COURT: —answer it. Yes, I think it is all right.

A. I was about to say it seems to me that you have asked me a legal question and I am not professing to answer it as a lawyer or anything of that sort. As I understand your question, all you have asked is if a classification is set up putting into one class establishments of less than a certain size and in another class establishments of a larger size, then, for the purposes of that Act is that a classification. And the answer is obviously yes.

BY MR. ZORN.

[335a] **X-Q.** That is precisely what I am getting at.

THE COURT: Well, his only trouble with the question as I understood it was you spoke of “sales” being over a hundred thousand dollars and then you have to determine—and I don’t know whether you are asking him—whether he considers that banking and financial transactions are sales.

MR. ZORN: Well, I may not have been clear.

THE COURT? You did use the word “sales”.

MR. ZORN: Let me make it clear, the illus- (462) tration I want.

THE COURT: You mean “transactions”.

BY MR. ZORN:

X-Q. The question I want to give you is simple and I am not asking you for a legal conclusion at all. All I am asking or suggesting to you is that if you had a law of that nature which specifically in the law describes a whole series of enterprises as retail depending upon their volume of sales and another series, complete series, of business enterprises as wholesale depending, again, on the volume of sales; for the purposes of that particular law, they would be described as retail or wholesale but they certainly wouldn’t meet your traditional definition of retail.

A. That is right.

THE COURT: Oh, yes, that is right. I see what you mean.

[336a] THE WITNESS: All you are saying, as I understand it, is that the law can set up any classifications however arbitrary they may be or may seem to anybody else and, thereafter, for the purposes of the law, those are the classifications; and my answer is yes.

BY MR. ZORN:

X-Q. What I am suggesting by that line of questions, Professor Whittlesey, so that you and I understand each (463) other, is simply this: that you have expressed your opinion in this case based upon your background and your experience and your knowledge of the more or less traditional understanding of retailing and you have not come here for the purpose of giving any specific interpretation as to how this particular law in all its ramifications should be interpreted, isn't that correct?

A. Yes, except that I am—I made it clear all along that it seemed to me that this list is to a certain extent arbitrary in the sense that they have established certain classifications for their purposes which are fairly clear--

X-Q. Well, you seem to have that list on your mind, and I, likewise, have it on my mind, so let's go to it now.

A. Yes, surely. I don't profess to be primed on that list but I will do my best.

X-Q. I would like to ask you this general question and I would like to ask you this: that using the same traditional test of tradition and common and popular usage to determine whether a particular establishment is retail or wholesale, I would like to ask you whether under that test, on which your opinion has been based or is based in this case—

A. Wait a minute. Excuse me. You have thrown in something that I didn't say. "On which my opinion was based?" I said that that is not the only test—

[337a] (464) X-Q. Your opinion as to retail, as to what constitutes a retail establishment—

A. No, no, tradition is not the only thing—

X-Q. Well—

A. One of the things that we mentioned earlier: we excluded size but we didn't exclude the customer, we didn't exclude the commodity—

X-Q. I beg your pardon. You are perfectly right. So let's be clear about that, and I am sorry about that.

You mentioned traditional understanding, popular usage, and, then, you added two additional factors, as I recall it. One was the type or nature of the customer and the other was the purpose of the transaction, whether it was for business purpose or for consumptive purposes.

That, roughly and generally, constitutes the test that you are applying; would that be correct?

A. Yes.

X-Q. Now, using that test, I would like to ask you whether or not the hotel business, the operation of a hotel, comes within that test—

A. Of being retail?

X-Q. Yes.

A. Well, now, as I said before, that list is not made up exclusively of things that are retail; it includes, also, (465) things that are comparable with it, where it isn't a commodity, and, therefore, is not retail in the sense that a grocery store is.

Now, I would put that in the category dealing with final consumers, if we mean the hotel services that I just enjoyed, that operation, in, that sense—

X-Q. Fine—

A. I would say that that belongs over in the service end—service and retail classification—category. But that doesn't make it a retail organization as popularly understood.

[338a] X-Q. As I understand you, you say that there are things that in your judgment or opinion definitely are retail and there are other institutions which are comparable to retail, is that—

A. That that list includes.

BY THE COURT:

X-Q. What you are saying, as I understand it, is if you have to classify it as either retail or wholesale, it would belong on the retail side of the line?

A. Yes, and with other definitely retail establishments.

X-Q. Yes.

A. That is right. But it doesn't mean it is traditionally viewed, in the sense that a grocery store is traditionally (466) viewed, that way.

BY MR. ZORN:

X-Q. That is right, but it fits into a retail classification—

A. If it fits.

X-Q. If you are classifying retail because of the type of customer and the purpose of the transaction. But it does not fit by reason of tradition, popular understanding or popular usage?

A. Understanding the retail classification as the Court has expressed it.

X-Q. As a matter of fact, may I ask you this: you made reference to the curriculum of the Department of Marketing at the Wharton School. Does the Department of Marketing give a course in hotel management?

A. You are having a witness from that department shortly, sir. I believe not.

X-Q. Now, let me test your recollection on the thing. The Department of Marketing doesn't teach operations of [339a] embalming establishments or landscape gardening or bowling alleys or dance halls or masseur establishments or parking lots or barber shop operation, does it, to your knowledge?

A. No.

X-Q. So that the mere act that a particular course in marketing which may be limited and, as I understood you (467) yesterday is limited to the so-called traditional retail trade would not necessarily mean that some particular form of business which was not included in the curriculum could not possibly be retail?

A. No, I attach no great importance to that little bit of evidence I threw out but it is true that if we had such a course that is characteristically and customarily thought of as being retail, I would expect to find it there. But the fact of the matter is that we do have—we do teach something about these personal finance companies, and they aren't thought over there.

Now, the case of embalming, we don't teach that, so it is irrelevant—

X-Q. Well, landscape gardening—

A. But I am not sure.

X-Q. Now, let me ask you this: landscape gardening might be taught in the school of agriculture but the Administrator might still classify it as a retail service, that is possible, isn't it? —

A. That is right; that is one of those arbitrary classifications.

X-Q. Well, you might help us a great deal if you would just point out, not necessarily exhaustively, Professor Whitteley, because I would like to save your time if we can, taking this (468) list which the Administrator describes as types of establishments whose sales or services may be recognized as retail, and just go through that list and give us some examples of the institutions or businesses included in [340a] this list which do not meet your traditional common usage test as you have explained it here.

Mine is marked up. Would you rather have another copy?

A. I don't care.

Now, do I understand that you are asking me to amplify the remark I made a while ago that I think most people did not think of a crematorium as being a retail organization, and what others—

X-Q. That is right.

A. And what others are like that? Would you like me to mention also those that do seem to be retail or only those which seem not to be traditional.

X-Q. If you would, I would like you first to—

A. Well, I don't think there would be any question—

X-Q. Well, let's understand what we are doing here, Professor, so there is no confusion. What I would like you to do if you will, is simply this. Take those establishments here which traditionally and by popular usage, forgetting for a moment the type of customer or the use, but (469) those types of institutions which are listed here, on your traditional and common usage test, forgetting for the moment any other test, and tell us which of these institutions do not meet that test.

A. Now, you are referring to the one test only, the one of these three tests, namely, that of tradition—

X-Q. Precisely.

A. and people's thinking—

X-Q. Precisely. There is no misunderstanding about that.

A. It seems to me that Auto Courts are not thought of as retail—I put them over.

Now, I will try to list only those, unless I get confused here, that are like the crematoriums, that are not too generally thought of as being retail in the sense that a grocery store is retail.

[341a] X-Q. That is right. That is exactly it. Will you go down the line on that, on those establishments?

A. I don't know quite what the next one means, "Automobile Dealers Establishments." Let me skip that.

Automobile Laundries, I would say no.

Automobile Repair Shops, no.

I wouldn't even put Barber Shop there.

X-Q. Yes.

A. Likewise, beauty shops.

(470) Bicycle Shop—does that mean repair or sale of bicycles? Let's skip that one.

X-Q. Well, we can skip that as long as there is any.

A. Billiard Parlor.

X-Q. Billiard Parlor, how would you classify that?

A. I would say that they are not. I don't think of them as a retail store, retail—

X-Q. As a retail establishment or whatever you want to call it. I think it would help us if we thought in terms of retail establishment.

A. All right.

X-Q. If that is the concept you have in mind.

A. In the sense that a—

X-Q. Based on the traditional common usage and common understanding test alone.

A. Yes, in the sense that a grocery store is put in the other category.

Bowling Alleys.

Cafeterias.

BY THE COURT:

[342a]. X-Q. Certainly nobody would say that a man who operated a barber shop was a retailer. It just wouldn't fit. Maybe he has got a retail establishment.

A. Well, likewise, cafeteria. I think a cafeteria is. There is no substantial difference but I think as in the case of barber shop we wouldn't think of them as being retail establishments.

[343a] THE WITNESS: There are many, it seems to

me, that aren't there for that traditional—cemeteries is another one.

I would say coal yards, ordinarily not.

And crematories not.

Dance hall, not.

I wouldn't think of a dress-suit rental establishment as a retail store.

Neither would I embalming establishments.

I am not quite sure enough about farm implement stores, but I would say it was retail, a retail outlet for farm implements, unless something on a large scale.

[344a] BY THE COURT:

X-Q. The ones you don't mention I understand you think properly belong as retail?

A. Right, and we will put this one in that list.

I am unsure about the next—retail stores, I don't think—we would say retail store; we wouldn't put it in—if it said retail establishments, we might put it in.

BY MR. ZORN:

X-Q. Which one is that?

A. The filling stations. That means a gas station.

X-Q. Filling station?

A. Yes; I am not—I think that is a borderline case, where you would have to amplify it a little bit.

X-Q. Well, in that particular connection—

A. If you want me, I will go ahead and try to be more accurate.

X-Q. No, go right ahead, I simply wanted to ask you about the filling station for a brief moment.

A. It clearly is retail—

X-Q. Would it make any difference in your judgment, as you say, whether or not you would classify a filling (475) station as a retail establishment, if the overwhelming majority of the sales made by that particular filling station were made to truckers operating in interstate commerce?

I mean, would the nature of the sales—

A. In a particular case I can imagine a wholesale filling station but by and large, the reason I hesitate over that is this, there is no question in my mind that I went to a retail establishment in having my gas tank filled, but it seems to me that most people think of a service station as a class by itself, and they don't stop to think of that as being a retail [345a] establishment, retail store, so the expression comes a little strangely.

But I think if you asked anybody, "Well, now, let me ask you a further question, is that a retail store or is that a retail establishment?", I think they would say "Yes", without hesitation.

Now, you see, it is a difference between something that sounds strange and something that would—almost anybody would accept on a second question as falling in that category? Do I make myself clear?

(476) X-Q. We won't argue about the filling station, we will proceed with the others.

A. Proceed?

BY THE COURT:

X-Q. You have a bigger hurdle if you ask whether it operates as a retailer.

A. Yes, that is right.

As far as a floor covering store, I don't know quite what that is, I don't know what it means. Carpet store? Oh, sure, if that means a rug store selling at retail, I think that is a retail store.

Florists, yes.

Funeral homes.

BY MR. ZORN:

X-Q. Funeral homes?

A. Wait a minute, I am mixing up here.

X-Q. Yes, let's get the record straight.

A. I did not mean to—I am mentioning the ones that don't belong in the list.

X-Q. Yes, in other words, when you said floor covering stores and florists—

[346a] A. I shouldn't have mentioned them.

X-Q. —you mean that you regarded them as retail (477) establishments,—

A. Yes.

X-Q. —and did not include them in the list of not generally—

A. That is right.

X-Q. —recognized retail establishments.

A. Funeral homes is not, generally.

Fur repair and storage stores—no—are in my list.

X-Q. When, again, to have the record clear, when you say "no", that means they are not generally traditionally recognized as a retail establishment?

A. We have already discussed hotels, but I would add that to my list.

Household furniture storage and moving establishments.

Moving establishments, furniture storage and moving.

Household refrigerator service and repair; that is the service and repair.

X-Q. Yes.

A. Lumber yards dealing with the public—I don't know, lumber yards—depending upon the character of them. Most of the lumber yards I think of, I don't (478) think of as being a retail store because they are more likely to be dealing with others, but I don't know—

X-Q. Well, let me pose the question, then, your understanding and my understanding of lumber yards is that none of them as we understand them deal exclusively with the individual consumer, that you may have a lumber yard in any part of any town or city, but it sells its product, it sells its lumber not only to consumers, but sells also to contractors and people engaged in the contracting business.

A. Let me say I would put that—

X-Q. Assuming it is that kind of a lumber yard—

A. I would in general put this over in my list. But if it [347a] is a small type, dealing with the final consumer, it could go in the other list. But that is a question of fact as to the type of particular lumber yard, I think.

X-Q. All right, sir.

A. Masseur establishments.

Now, it depends, on the next, if it sells and largely sells musical instruments, I would put it—I wouldn't put it in my list. If it is primarily for repair I would put it in my list. I (479) think in general it would not belong, ordinarily, the ones I can think of wouldn't belong in my list.

X-Q. You say wouldn't belong in your list; which list, again, to be clear, are you referring to?

A. Of those excluded, not thought of, not traditionally thought of—

BY THE COURT:

X-Q. The ones that are arbitrarily listed?

A. Yes, unlike the grocery stores.

BY MR. ZORN:

X-Q. How about newsstands?

A. Well, I know that that is a touchy one, but I wouldn't put that in my list. I think of that as retail in the same sense as groceries. I recognize—I believe it is my understanding that it is otherwise thought of.

X-Q. In other words, you would agree to that, you would agree that there is some doubt as to whether it meets the traditional test of a retail business?

A. Well—

X-Q. Some doubt, I said.

A. No, no, to me that is a retail.

X-Q. I see.

A. The same as grocery store.

[348a] (480) X-Q. All right.

A. It doesn't belong in my list.

X-Q. Of non-retail, right.

A. Now, again, paint stores, sale of paint—yes, that is not in my list, paint.

Public parking lots are.

X-Q. On your list of non-retail establishments?

A. Yes.

X-Q. Not customarily thought of?

A. That is right. Piano tuning.

Public baths.

Public garages, here is one like the instruments, but I am leaving it off mine because I think they are thought of as selling a commodity, chiefly.

Recreational camps.

X-Q. That is on your list of non-?

A. Yes.

X-Q. Generally understood retail?

(481) A. Yes, definitely.

And I would include restaurants in my list, roadside diners, for reasons mentioned in connection with cafeterias.

Scalp-treatment.

Shoe repair.

Shoeshine.

Theaters.

X-Q. Theaters? Now, just to be clear about that, would you include in this non-commonly thought-of retail list both motion picture theaters and legitimate theaters, just to be clear about that, if that is what this means?

A. Yes.

X-Q. Thank you.

A. As far as I am concerned.

X-Q. Yes?

A. Tourist houses.

Trailer camps.

[349a] Undertakers.

Valet shops—now, that is pressing and cleaning, right?

(482) X-Q. That is my understanding of it.

A. Watch, clock and jewelry repair establishments.

X-Q. Repair as distinguished from a jewelry store—

A. Yes.

X-Q. —which simply sells.

Thank you very much, I think we have covered that subject.

You indicated yesterday, Professor Whittlesey, in commenting on some of the statements which were in our exhibit with respect to references of retail or wholesale to the small loan business, that by submitting the word “large” or “small”—large for wholesale, and small for retail—the articles would have made just as much sense; is that substantially what you said?

A. Yes, it is a somewhat loose statement and it wasn't followed through with explicit detail, which I would be glad to supply now.

X-Q. Well, let me ask you this, however. If instead of substituting the word “large” for wholesale sale you had substituted the word “business” or “industrial”, and instead of substituting the word “small” for retail you had substituted instead “consumer”, wouldn't (483) the articles have made exactly the same sense, or made good sense?

A. No.

X-Q. They wouldn't have?

A. No, I will tell you why—and I am not trying to evade anything. Take the second step, the example, “Mass Credit”.

X-Q. Which one are you referring to?

A. Exhibit 2, number 2; it is the first one that has caught my eye. It is certainly one of the most distinguished of these. This is Exhibit 2.

X-Q. Yes, go right ahead.

[350a] A. “Retail prices are always higher than wholesale”; that makes sense when you say smaller always

higher than large, because you are thinking of small and large in the same bracket.

But when you say industrial and commercial, over and against consumers, you may be thinking of entirely different items.

Now, the markup on industrial and commercial for, oh, scientific instruments, may be higher than the consumer's for groceries, and that is the reason I can't accept that.

(484) X-Q. Well, I don't think that because of your limited time I will pursue that to any extent, but I think it would be a very interesting endeavor to take what you have done and substitute the word "large" and "small".

A. Well,—

X-Q. and similarly do the other and see where we come out, for purposes of comparison.

A. I dare say it is a broad statement and open to—

X-Q. Well, I could ask you this in that connection: There has been introduced in evidence the monthly statement of the Board of Governors of the Federal Reserve System—Exhibit D-4—dealing with Sales Finance Companies, and there is this heading, "Retail Financing" and this heading "Wholesale Financing". Now, would it make any sense if the Federal Reserve Board sent this bulletin out reading "Small Financing and Large Financing"?

A. Well, as it came out, I think it was Melnicoff's testimony yesterday, what was being discussed, as I understand it, was not retail as we are talking about it here, but the financing of retail transactions. Then it makes quite a difference.

X-Q. No, but I understood you to say that taking any—
(485) maybe I misunderstood you, but I think the impression that you sought to convey, at least as I understood it, was this, that when any references are made to any financial [351a] institutions or any operations of the financial industry and the word "retail" is used and the word "whole-

sale" is used, that in your judgment that means nothing more than retail-small and wholesale-large. If that was not your impression I wish you would correct us on it.

(486) A. Yes, I think that "wholesale" and "retail" are important distinguishing terms, and I indicated, I think, some of the bases for identifying those terms.

Now, what I was saying was this, that when an attempt is made to stretch those legitimate uses to doubtful things, outside the test I have suggested, stretching them very broadly, then the classification loses its original distinctive significant meaning and becomes one of "large" and "small", and that is the reason I would repudiate that. I would say in the official classification that is a useful and desirable distinction but when it is stretched as I feel it was here—

BY THE COURT:

X-Q. When you say "here" you mean in the article?

A. In the exhibits, yes.

X-Q. Now, you are putting the Federal Reserve in an entirely different category.

A. Absolutely, I think that is meaningful and I think in most cases—

THE COURT: Yes, I understand.

THE WITNESS: All right.

BY MR. ZORN:

X-Q. Well, then, to be clear about that, you would not (487) eliminate the validity of the use of a term "retail" or "wholesale" as it is used in any aspects of describing financial [352a] operations nor as to the Federal Reserve Board, would you? What you were directing your attention to, however, was some of the quotations from some of these particular articles?

A. That is right.

X-Q. And you didn't intend to go any further than that?

A. Any further? I will be glad to explain what I said

before, but I didn't mean to say, no, that "wholesale" and "retail" are meaningless.

(488) X-Q. Well, I might ask you—

A. Please do.

X-Q. —as to the meaningfulness of your own use, Professor Whittlesey,—

A. Delighted.

X-Q. —of the term "retail" and "wholesale" as applied to the financial industry. Now, you wrote a book, which I understand is one of the classics—

A. Well, that is too complimentary.

X-Q. —in the field of Money and Banking, entitled "Principles and Practices of Money and Banking", published by MacMillan in 1948, and under the general heading, the chapter heading entitled "The Structure of the Financial System" you are discussing, among other things—and you know this book a lot better than I do, I am sure,—

A. You have read it more recently than I have, I am sure of that. I deny that it is a classic, but I won't disclaim it.

X-Q. But you will admit it is a darned good book?

A. Well, I won't do that—

X-Q. You were discussing "Sales financing" as part of a chapter dealing with "The Structure of the Financial (489) System", and in that connection you say—and I don't want to take anything out of context and I will let you have this in just a moment—but you say specifically, under the general heading of "Sales financing":

"Sales finance companies"—and I quote "Lending is of [353a] two types, wholesale and retail. Wholesale financing consists of advancing funds to dealers, usually on the dealer's promissory note. The notes are ordinarily secured by warehouses or trust receipts covering, for example, the cars which are being financed. Much of this business is of the type customarily handled by commercial banks. Re-

tail sales financing involves the financing of purchases by consumers themselves."

Now, that is a pretty direct statement—

A. Yes, well, now,—

X-Q. —describing those particular lending transactions, is it not?

A. —as I remember it, the reference is to the financing of wholesale operations, over and against the financing of retail transactions, and in the case of (490) wholesale financing you are financing the distributor.

X-Q. That is correct, and in retail—

A. And in the other case you are financing the retailer.

X-Q. The consumer?

A. The consumer.

X-Q. That is correct, we agree on that. But what I am getting at is this, Professor, and I don't think we need have much debate about it, there is no question in your mind that the terms describing certain types of financial operations or transactions as retail or wholesale are terms which have been generally used by yourself and by other authorities in the field, by the Federal Reserve Board and by others, isn't that true, in describing the particular type of lending transaction?

A. In the matter that extends that to these personal finance companies, no, it isn't that. This is a particular operation, a particular type of security, if you will, where you are refinancing and making it possible for the businessman himself, the distributor; you are financing the distributor.

[354a] X-Q. Yes, there has been considerable testimony about (491) that in this case thus far.

A. Yes.

X-Q. Let's forget for a moment—

A. That is quite different,

X-Q. —about small loan companies, let's forget about

them. All I want to know is whether it is not the fact that in describing another type of financing or financial institution you describe the operation yourself as a retail or a wholesale operation. That is so, isn't it?

A. Now, wait a minute, here, for a different reason, a reason that does not apply. If I said somewhere in there that the personal finance is a retail credit institution, well, that is more relevant. I would still be delighted to see it.

X-Q. Just a moment, I haven't asked you about that at all.

A. Well, it may be, I don't deny it.

X-Q. I am asking you this,—

A. If I have, I used it in that descriptive, expository sense.

X-Q. As I understood your testimony yesterday, the terms "retailing" and "wholesale" were sort of imported into, (492) by way of comparability in some way, in a limited use, and so on, into the operations of the financial industry, and I am not referring specifically to personal loan companies, and I ask you, however, whether on the basis of your own writings and your own teaching, and the writings of other authorities, and the use of terms by the Federal Reserve System or the Federal Reserve Board in its various publications, there has not been over the years a very definite descriptive concept of applying the term "retailing" and "wholesaling" to some of the functions of the financial industry.

(493) A. In the pedagogical, expository and—what was the expression?—in the last analysis sense, yes. But as a title I feel, no, that is not the case. To say that they [355a] are retail establishments, and retail in the sense that I have prepared that list a moment ago, I would say, no.

X-Q. But, nevertheless, in describing—I won't take the time now, Professor Whittlesey, but I suggest to you that we might look at some of the standard definitions of whole-

salings and retailing as they are described in dictionaries and in Supreme Court opinions—

A. I have one right in my suitcase.

X-Q. I won't take the time to do it now, but I ask whether or not the term "retailing" or "wholesaling" is to any extent limited as you have limited it here, but since you don't have the time to do it now we will drop it at that point.

A. I can do it in twenty seconds.

X-Q. Did you hear the testimony here of Mr. Schmus, of the First National Bank of Chicago?

A. I was here for part of it. I was trying to read some of these things that hadn't reached me before, including these exhibits. I can't say I followed it (494) closely.

X-Q. Well, did you hear any part of his testimony in which he very categorically said that in the financial fraternity there is common recognition, very definitely, that certain functions are wholesale and certain other functions are retail? Did you hear that phase of his testimony?

A. I think so, yes.

X-Q. And Mr. Schmus, as you know, is not what you call a pedagogue—I would prefer to call it a professor—and I would assume you would assume with me, wouldn't you, that he was not using those terms in a pedagogical sense—

A. That is right.

X-Q. —but was using them in banking language?

A. That is right.

X-Q. I have just one more brief line with you, and I think we can do it very quickly,—

[356a] THE COURT: Hand that up, will you? I want to see that dictionary.

BY MR. ZORN:

X-Q. I would like to ask you this question in connection with certain things you said yesterday, Professor Whittlesey. Do you know of any state law—forgetting for the

moment Regulation W—do you know of any (495) State law, or even local law, with the exception of a sales tax law, possibly, which applies universally to all of the types of retail establishments that you have classified as meeting the traditional test?

A. Ask that question again. I think the answer is no. I don't have any such knowledge of the law as that.

X-Q. Well, there was a little discussion here yesterday about legislation in the small loan field, and so on. I would like to ask you, first, whether on the basis of your knowledge and experience you know of any State or local laws, aside from possibly sales tax laws, which apply to the retail trade as a whole, as you understand and have described the retail trade here?

A. That is a legal question.

X-Q. You don't know the answer to it?

A. Well, I have no doubt there are many that do and many that don't. I think generally—

X-Q. Can you think of any, any law that is applied—any regulatory type of law that is applied uniformly to all types of retail establishments that you consider as part of the retail trade?

A. Well, I would think of regulation of safety, fire exits or something—is that what you are talking about?

(496) X-Q. No, I am talking about a law that is directed to the problems or possible abuses which may exist in the retail trade, for the protection of the consumer. That is [357a] the type of law I have in mind, and I am asking you, though I know you are not a lawyer, whether on the basis of your wide knowledge of the retail field you know of any such type of law which applies uniformly and universally to all types of retail establishments?

A. I can't answer that offhand—I know of none that occurs to me like that. I am simply not—that is not in my field. I couldn't—

X-Q. All right, let me ask you this, then,—

THE COURT: A law regulating things like fake fire sales, fake bankruptcy sales; there could be and maybe there are.

MR. ZORN: That is right, they might apply to certain types of establishments and not to others. That is the point I am trying to establish.

THE COURT: I think they might in terms apply to all retail establishments.

MR. ZORN: That is conceivable.

THE COURT: Yes.

THE WITNESS: That takes more knowledge (497) of specialized law than I have, certainly.

BY MR. ZORN:

X-Q. Now, let me ask you this. A local liquor store, where people buy bottled liquor, or a package liquor store, you would treat, would you not, as a retail establishment?

A. Yes.

X-Q. And there is no question, is there, in your mind, based [358a] on your general knowledge of things, that there are special laws applying to those local liquor stores with respect to, in some States, the limitations on the amount of sale to the customer, limitations with respect to whether or not they can sell for credit, and other types of regulatory limitations? I am not trying to get you to define all of them,—

A. Well,—

X-Q. But I ask you whether you know generally that that type of regulation applies to a liquor store but does not apply to a food store or to a jewelry store?

A. Those are for sumptuary reasons, are they, for health reasons, or something of that sort?

THE COURT: I would say police purposes.

THE WITNESS: Police purpose?

(498) MR. ZORN: That is right.

THE WITNESS: That contradicts what I said yesterday and I accept it as a contradiction. I hadn't thought of it. I think that is perfectly true.

BY MR. ZORN:

X Q. Well, I could go down the list with you—

A. For some special reason.

X Q. Yes, I could go down the list with you, Professor Whittlesey, and demonstrate to you that certain types of regulatory laws for the protection of the consumer which might be applicable to a grocery store would have no application whatever to a furniture store.

MR. WEINER: Is this a question or a statement?

[359a] THE COURT: No, it is all right, it is an argument.

MR. ZORN: Well, I will ask it as a question.

THE COURT: No, let it stand, don't bother.

THE WITNESS: I get the point.

BY MR. ZORN:

X Q. And the point is this—

(199) A. I wasn't thinking of that yesterday. On the other hand, it doesn't change my point of view.

X Q. The point is this,—

A. —comparing it with drug stores and grocery stores.

X Q. Yes.

A. Drug stores, for example, that would include narcotics.

X Q. Yes.

A. There are regulations of that sort.

X Q. Prescription regulations and labeling regulations and sanitary regulations which might be applicable to one type of retailing, like drugs, would have utterly no application to anything else.

A. But for clearly specified reasons, the protection of health or protection of public morals or health.

X Q. And the basic reasons for those laws are the pro-

tection of the public from abuse, protection of the consumer from abuse, I think we could agree to that.

A. In a specialized sense.

X-Q. And I would simply like you to agree with me, if you can, that simply because one type of regulatory law directed for the protection of the public applies (500) to one type of retail establishment, and is completely foreign to another type of retail establishment, does not make the second retail establishment non-retail by reason thereof.

[360a] A. Well, I think that is a very—

X-Q. It is obvious, isn't it?

A. Certainly.

THE COURT: That answers itself.

THE WITNESS: Yes.

THE COURT: Five minutes of eleven.

THE WITNESS: May I—since I was asked about a desk dictionary, I would be delighted to look at this dictionary; I brought this dictionary because I thought it might interest the Court that I was one of the expert consultants and was responsible for the words in this particular field, as was indicated in my qualifications.

Now, you have asked about this; I hadn't read what it said about wholesale and retail at all last night, you asked about it, there it is, and I would be delighted to have it in the record.

(501) MR. ZORN: I would be glad to have it.

THE COURT: Read it into the record later on. I consult dictionaries and I don't happen to have that, so just read it into the record.

MR. ZORN: I suggest it be put into the record, and at the same time direct the attention of this Court to the decision of the United States Supreme Court in the *Roland Company versus Walling* case, 326 U. S. 657, where the Supreme Court quotes definitions from various dictionaries.

THE COURT: Yes.

[361a] MR. ZORN: —various sources, and so on,—

THE COURT: Oh, yes.

MR. ZORN: —in discussing this ultimate consumer test. But we will be very glad to make that part of the record here and not take Professor Whittlesey's time.

THE COURT: All right, can we let him go now?

THE WITNESS: That is a personal copy, it is stamped as given to me by the publisher. I don't want to leave the book.

(502) THE COURT: No, just read those definitions in.

MR. ZORN: No, I have nothing further. I think I have met my deadline.

THE WITNESS: Thank you very much. I appreciate your courtesy and the courtesy of the Court very much.

THE COURT: Somebody read those in.

MR. WEINER: I will read it into the record.

THE COURT: You read it into the record and he can take it back.

(In The American College Dictionary, edited by Clarence L. Barnhart, etc., published by Random House, New York, the following definitions appear:

“retail * * * n. 1. the sale of commodities to household or ultimate consumers, usually in small quantities (opposed to wholesale) * * * ”

[362a] “wholesale * * * n. 1. the sale of commodities in large quantities, as to retailers and jobbers rather than to consumers directly (opposed to retail) * * * ”)

[390a] LEON HENDERSON, recalled.

DIRECT EXAMINATION.

BY MR. ZORN:

Q. You have been here throughout and heard testimony of the Government's experts, namely, Mr. Melnicoff, Pro-

fessor Whittlesey and Dr. Blankertz, and in connection with their testimony there have been references to the fact that at least one or more of these gentlemen consider that the small loan business, or the operations of the Lancaster [397a] office, are not retail, in their opinion, but they proceeded to discuss questions of being related or analogous to retail, but not retail, particularly with respect to Professor (550) Whittlesey's comments on certain of the articles, including your own, which were introduced in evidence. Having heard that testimony, would you be good enough to give us your comment on it?

A. Yesterday one of the Government's witnesses dared to be facetious without reproof, and I say that possibly I am being reminded, in all this discussion of retailing, in which it seemed to me the Government's witnesses did not agree, of that story about a man, that says, "If I see something that looks like a duck in a place where ducks go, and it swims like a duck, and it squawks like a duck, I call it a duck."

Similarly, to me, I call it a duck; I don't call it an analogy, or a caprice, or, as Professor Whittlesey said, a statement of a tired professor or pedagogue, I think.

Now, there have been several—

Q. Go right ahead.

A. There have been several tests applied, and I am going back constantly to why was it I inherited a concept, not that the small loan business was analogous to a retail business, why was it that the Sage Foundation, using exact language said, "We want to create a business just like a grocery store".

(551) Well, there have been a number of definitions about retail establishments, and certainly, one of them is that of an end-of-the-stream establishment, that it is for the ultimate consumer, without purpose of resale, participation in manufacturing, and it is in small amounts, and therefore

the costs of doing business are higher, and therefore, the markup or the charge^o is higher, as contrasted with the wholesale charge.

[398a]. Another is that in order to be a retail goods or service establishment it has to be generally available to the public.

Well, the small loan company meets all these tests.

As far as being at the loans to consumers, the National Bureau of Economic Research, if I recall, said that not more than about five per cent of the transactions were other than for purely consumer or consumptive purposes.

And, certainly, it is at the end of the stream, and as I know small loans they are not for the purpose of resale or for use in manufacture.

There is a limitation, in most of the uniform and similar small loan laws usually to three (552) hundred dollars in amount, and there have been independent studies—I think I initiated them—of the cost of doing business by the licensees, and those studies were further refinements of the figures gathered by the State supervisors.

It is very clear that the businesses that were successful had higher cost. It is quite evident from the special rates allowed by the legislature that markup was higher. And Dr. Wilford I. King, who was then, I think, secretary of the American Statistical Association, made the most extensive study that had been made up to that time of any one State, and he contrasted—not at my suggestion—the markup that was necessary in small loans. And it is my observation—and I think it has been commented on—that the small loan company must be available in the shopping center, at the same place where consumers come to buy goods, in order to render the service.

(553) And then over and above that, there has been the testimony that the small loan industry regarded itself as

retailing, and that it was so regarded by other divisions of the financial industry.

And so I say—let's take the exhibit that Dr. Whittlesey commented on yesterday, if that stood alone it might say that my testimony, from my much more intensive experience, [399a] accepted what he had said about what you might say the pedagogical nature; I believe he paid tribute to the Twentieth Century Fund. I have a quotation in that. That study, by the Twentieth Century Fund—Dr. Evans Clark—was a very responsible study, and that selection of the terminology designating the small loan business as the credit, as the retail part of the business, was not done as any means of shorthand, and it is similar to the Pollock Foundation, which I cited the National Bureau of Economic Research—agencies which I am sure the government's witnesses rely on and accept as being painstaking agencies.

It was not as if a letter had been written to invite a favorable statement as to retail. There was no question in this period of federal legislation of any kind separating out retail for (554) favorable or unfavorable consideration. These were made over a period of time. And my selection was from a large number of observations and represented a firm and fixed and inherited conviction that I had as to the retail nature—not analogous, but retail nature.

And I might say that in connection with this case I reviewed what I had written, to the best of my ability and I do not believe that there is anything in all that I have written or testified before congressional committees and others that could be used to what you might say damage or mar the serious statement I have made about the retail nature of this particular industry.

BY MR. ZORN:

Q. Well, let me understand this, Mr. Henderson; you have said consistently that everything you have heretofore said that there are certain tests you apply in determining

whether an establishment is a retail establishment or whether a business is a retail business, and among those tests are, where is it in the stream of business, it is the [400a] end of the stream, dealing with the ultimate consumer and the transactions are with the ultimate consumer and not generally for purposes of resale. That is one major test, is that correct?

(555) A. That is correct.

Q. Similarly, the size of the transactions also in your judgment plays a part in determining whether a particular institution is retail or something else, is that correct?

A. That is right.

Q. All right. Now, the suggestion has been made in this case that the opinions within the industry and outside the industry, and the observations you referred to and the articles which were written in the days when the Russell Sage Foundation was actively engaged in sponsoring small loan legislation, were not a definite categorization or statement that the small loan business was retail, but rather that they were for the purpose of analogizing it with the retail business or with something else.

Now, on the basis of the experience you have had with this particular field and with all the groups you worked with all through the Russell Sage Foundation days and since, would you say now, apart from your own statement, which is clear, that you described and knew the business as retail, would you say that the views which you have testified to here before were views of people which described the (556) business and understood it and knew it as a retail business, or whether they were attempting to analogize to something else?

A. Well, I think your questions just can be answered by saying that was the burden of my opening statement here. It certainly was not in my opinion analogizing, it was description.

Q. Well, what I want to be certain that the record shows, Mr. Henderson, is that in connection with your testimony as to the views and opinions of all of the various groups [401a] in the financial industry and outside the financial industry, as to which you testified earlier in this case, whether those were views which reflected a direct recognition of this business as a retail business, or reflected an indication of analogy or comparability to the retail business.

A. It reflected, as I said, the opinions of people in the industry, of legislative committees in their reports and their studies, and I think I—if it needs more emphasis, I think—and this is one of the tests that are usually applied to a question of fact as to the bygone days—I think if there had been any significant difference in opinion, that opinion, I would have remembered that, I would have remembered the isolated case, and there may have been, but I just do not remember.

Q. Now, Mr. Henderson, to proceed to another point, various questions have been raised in the course of this trial as to whether or not the loan transaction as described in the stipulation, the loan by Household in the Lancaster office, to an individual or a consumer is a service. Now, to refresh your recollection, Mr. Melnicoff testified that in his opinion that transaction was not the performance of a service, whereas Dr. Blankertz this morning testified that in his opinion it was the performance of a service.

Now, I would like to ask you, first, to comment or help us, help the Court determine, first, whether the loan transaction is a service or whether it is something else, as Mr. Melnicoff suggested.

A. Well, I think I testified on direct that it was a service, and one of the reliances I had was on the governmental classification of all the things of value that pass and make up the—well, first the personal consumption expenditures.

and then the totality of the gross national product, and I said I couldn't recall anything that was not goods or service, and I think at this particular classification, (558) goods and services, which is in the national income study, is more [402a] accepted than almost—it is more accepted in its use by government agencies than the Standard Industrial Classification Manual that has been referred to, which I said the Social Security Board, the Bureau of Labor Statistics have not yet adopted.

So from that standpoint, it is a service.

Now, when you come to the classification, as you have to do some times, as to what industries—let's take for codification purposes, I think I mentioned NRA, did I not?

Q. You did.

A. Although we didn't go into it very much, I had the job at one time, in quite a bit of a hurry in the absence of any standard manual, of arranging all the industries in this great pipe, as the General referred to as to whether they were manufacturing or non-manufacturing; in the manufacturing, whether they were durable goods commodities or whether they were consumer and durable commodities, and then in the non-manufacturing, whether they were services or service industries.

(559) Now, those service industries were not confined although they did include wholesale and retail, of course, and they had some sub groups—but anything that was not connected, any industry under a code, that was not connected with a manufacturing operation and a commodity was one of the industries that we called service industries.

Now, reference has been made by the government witnesses and government counsel that service industries themselves are to be found in this narrow category of services or else if they are commodities, they will be wholesale or retail.

Q. You are referring to the Industrial Classification Manual?

A. I am referring to the Industrial Classification Manual.

Q. May I stop you just at this point? Because I think this will help clarify the issue very quickly; so far you [403a] have testified, Mr. Henderson, that in the economy of this country you can have transactions in either goods or service or nothing else, and that that is supported by the gross national product breakdown and by the consumer expenditure breakdown. Now, taking the Standard Industrial Classification Manual, some of (560) whose short comings you indicated when you were called, when you were first called, I direct your attention to page 119 of the 1942 edition, which was testified to here by Mr. Melnicoff, and I would like to ask you to read the definition of service as it appears in that manual, on which the government apparently relies, and comment on what that definition indicates.

A. I am reading from page 119 of Volume II, Non-manufacturing Industries of the Standard Industrial Classification Manual, and it is under the head note:

EXHIBIT G-7 (page 119).

"SERVICES

The Division as a Whole

This division includes a heterogeneous group of establishments which are primarily engaged in rendering services to individuals and business establishments and which are not classified in other industrial divisions. Included in this division are hotels and other lodging places; establishments providing personal, business, repair, and amusement services; medical, legal, engineering, and other professional services; educational institutions; nonprofit membership organizations; and other miscellaneous services. These (561) establishments derive their principal income from the sale of their services, as distinguished from trade estab-

lishments, whose principal source of revenue is the sale of merchandise.

Certain types of establishments performing unique services of importance in the general pattern of industry are [404a] excluded from this division. Such establishments are banks and other financial institutions, insurance companies, construction companies and public utilities."

(562) Q. Well, would you stop at that point and will you interpret that?

A. I would like to comment on that in terms of how I originated this statement. I gathered the impression that there were no service industries or service businesses that could properly be called that unless they were in the division headed "Services". As a matter of fact, beginning with the first division—which is agriculture—and going all the way through, there are specifically found and named the service industries which are related to that major division. I think I said there were—in the last one there is ten, and then a non-classifiable one, making eleven. To my mind that is proper classification.

If there is a service function that can come and be properly identified with the industry in which it is working, either giving service to the manufacturer or distribution or performing a service in actual distribution at the final end, it ought to be classified there. And I made a list one time of those service industries which did not appear under that category. Your Honor; that we looked into and ran into. The first one was the laundry, as you will (563) recall, and I would hazard a guess that there is almost as many in there as there are in the division that is headed "Services".

So that while, as I say, I wanted to be clear that I am not trying to say anything derogatory of this manual, I think in my professional life I am proud of the fact that I helped to originate the idea, when I was with the Central Statistical Board, and we used it to the extent we could.

[405a] THE WITNESS: "Included in this division are hotels and other lodging places; establish- (564) ments providing personal, business, repair, and amusement services; medical, legal, engineering, and other professional services; educational institutions; non-profit membership organizations; and other miscellaneous services. These establishments derive their principal income from the sale of their services, as distinguished from trade establishments, whose principal source of revenue is the sale of merchandise."

BY MR. ZORN:

Q. You are quoting—

A. I am quoting.

Q. —from the Manual?

A. Now, I am quoting now the Manual, which is followed, and there was registration here by at least one of the Government witnesses, that he was literally bewildered that anybody should even consider something was retail or a service.

[406a] I might say in my experience I have never considered that the payment or consideration, or whatever it might be, for the extension of credit that (565) a small loan company does was other than the sale of credit, was the sale of a credit service. They were using their strength in the financial field and they were selling their services, this loan service, if you want to call it that, or credit service, but they were selling it.

In the Gross National Product discussion, which covers, as I say, the totality of the market value of all the goods and services produced, there is some language—I thought I had it marked here—that I would like to import into this discussion. Now, I am shifting from the Standard Industrial Classification Manual to this standard volume, which is an annual volume; it is headed "National Income, 1951 Edition", and it is put out by the Department of Commerce.

Now, it says, after talking about economic production under the heading of "Summary Construction of National Output Measures"—that is, the measurement of all the goods and services:

"In the present report, the basic criterion used for distinguishing an activity as economic production is whether it is reflected in the sales and purchase transactions of the (566) market economy. The exclusion of illegal transactions is a tradition-based convention which is an exception to this general rule."

I think that this flows, this is the next sentence, I have not picked it out of the context, in answer to that question you had about the ransom fee got,—

THE COURT: Yes.

A. —and it would be proper to poker winnings and stuff like that, that are illegal, which I doubt—

[407a] BY THE COURT:

Q. Bridge winnings?

A. And bridge losses. Well, there is just no doubt when you are considering the personal consumer expenditure for example, which is Table 30 in this particular volume, National Income, that they start with the purchases which consumers have made, and they give only, really, two divisions, goods and services, and in the goods, it is durable goods and non-durable goods, and then of the other things, educational institutions and labor union payments and the interest on personal debt, that was referred to yesterday, everything like that is a payment for service.

(567) Now, they come at it from the standpoint of a purchase and, as I say, if I seem to show a bit of incredibility to anybody that makes a big point on whether or not it is a sale, I wonder, how can you have a purchase of a service unless somebody sold it?

And I go again to this, going back now to the classification of industries, and they talk about these particular

groups as selling their service, as distinguished from organizations, the ones that were compressed in Dr. Whittlesey's definition of dealing in commodities.

(568) BY MR. ZORN:

Q. May I stop you for just a moment there, Mr. Henderson? Isn't it the fact or will you tell us whether or not in that description of the service group which you were reading from, from the 1942 Industrial Classification, there, the term "sale of service" and the term "performance of service" are used synonymously or interchangeably in that particular description?

THE COURT: That is performance for money.

[408a] BY MR. ZORN:

Q. Performance of service for profit and sale of service for profit are used interchangeably and synonymously in that particular document.

A. I think, Your Honor, I don't believe he—I don't think he is leading me, he knows what I am going to testify to because I have gone over it with him, but the next—

Q. If I tried, Leon, I don't think I could. (Laughter.)

A. —but the next paragraph says, "Certain types of establishments," that is, service establishments, performing unique services of importance in the general pattern of industry are excluded from this division. Such establishments are banks and other financial institutions, insurance companies, construction companies and public utilities."

In other words, in the paragraph in which (569) they have said that service industries are distinguished from trade establishments by reason of income from sale of service, they go ahead and say "certain types of establishments performing unique services."

Well, the fact that they perform unique services, I would interpret not to mean that they were out of a stream of general understanding as to whether they were a service function or not.

Q. But they refer, for example, to public utility companies, Mr. Henderson. I would like to get some of your thinking on that, when they refer to the services of the public utility company together with construction companies, insurance companies, banks and so on. Getting on the public utility situation, they refer there and they use the language "performance of services."

Now, on the basis of common knowledge and understanding, do public utilities furnishing light and power for the consumer's home use, are they engaged in philanthropic endeavors or are they engaged in the sale of whatever they are selling?

[409a] A. Well, I would say, of course, from general observation, that they were selling the services but I would go back again to the idea that the whole gross national product and the component of it representing, well, that one year, 180 (570) billion out of 280 billion of personal consumption expenditures represented purchase of public utility service and so it must have been a sale unless there is some terminology interchangeable.

In the Small Loan Law, we undertook to cover all the various types of words that were used as a substitute for charge or consideration, and Your Honor is more familiar with that in other laws, perhaps, than I am with this one, but it was always considered that there was the sale of service.

Q. Well, let me ask you this very simple question, Mr. Henderson. In your opinion is there any validity or can there be any validity to any distinction which is sought to be drawn between the performance of a service for profit and the sale of a service for profit?

A. I can't for myself see any and I don't want to rest that too heavily on the fact that in my work with government agencies and since that I am dealing almost constantly

with gross national product concept and personal consumption expenditures.

For example, I referred to the fact that last year with the assistance of Dr. Lerner, we undertook to take every expenditure that is listed in that personal consumption expenditure and see which were taxed and which (571) of the service or goods ~~was~~ taxed in the total amount, and that was a detailed breakdown and we never had a question that I could ever recall that any purchase of a service was not a sale.

Q. Well, now, directing your attention to this particular field we are discussing here, I have before me, Mr. Henderson, an article entitled "Credit For Consumers," written by [410a] LeBarren R. Foster and published by the Public Affairs Committee in which this statement is made and I quote, "In buying credit to advantage as in buying anything else, a person must know how to shop."

Let me ask you whether you agree with the concept expressed in this pamphlet that in obtaining consumer credit or making a consumer loan such as we have described here the individual who goes to the small loan establishment is buying something?

A. No question in my mind he is buying credit. He is buying credit and he is paying for it and there is the charge that is well known and accepted. You can call it by a number of terms but he is buying that credit.

Q. Well, if he is buying it and we agree on that, Mr. Henderson, then the person who is furnishing it, can he be doing anything other than selling it to him?

A. As I indicated before, I don't think he can. I haven't (572) seen that particular pamphlet until recently—for a long time.

Q. I mean just on the question of

A. Yes.

Q. —if somebody is buying something and paying for it.

the person whom he is getting it from, can he be doing anything other than, from your concept, selling it?

[411a] Q. Now, Mr. Henderson, I have just one more final line here. There has been some suggestion made during the course of this case, and I don't recall at the moment just where it was made, that in order to constitute a service, the service must be capable of being resold. Would you care to comment on that?

THE COURT: Oh, I haven't heard that suggestion at all. The question was raised whether there was such a thing as a possibility of reselling any services. That is the only question that has been raised. You mean that somebody [412a] said that you can't sell a service unless you can resell it?

MR. ZORN: That is my impression, Judge, and I may have misunderstood it.

(574) THE COURT: All right, if you think so. I may be wrong about it. My recollection was that the only question of resale was how you could resell any service. But you take it up your own way, it is all right. You can get it in the record.

BY MR. ZORN:

Q. Well, you can either answer my question and take your choice, Mr. Henderson, or combine your answer to my question with the suggestion Judge Kirkpatrick has just made, so we can save time.

A. Well, I don't recall exactly how this particular question came up but it just seemed to me that we had not put together all of the items as between the wholesale and the retail units. We spent some time—I did, and the other defense witnesses—outlining types of credit granting agencies which were wholesale and we felt were considered wholesale a long time, and others as being retail. And only,

I think, in Mr. Schmus' testimony at one time—and maybe he got sidetracked.

Another distinguishing feature is the fact that the banks are really manufacturers of credit and sellers on a whole sale base, if you want to push the analogy. A bank is generally known as different from other institutions in that it is able to make loans of credit several times (575) what its actual deposits and capital and surplus are.

And there is just no doubt that in the typical bank, extending loans either to the consumer credit granting agency, [413a] that they are making loans in big amounts on one single document, a note or whatever you want to call it, and that the agency receiving it disburses it in small amounts to the ultimate consumers.

I think Mr. Schmus was on the road to that at one time and got sidetracked, and it is similar to the insurance companies in their wholesale lending function.

I think I said that the volume of mortgages that were available couldn't keep pace with the income and therefore they had gotten into the business of making loans at wholesale. Well, certainly, they loan as ~~much as~~ eighteen or twenty million dollars at a time to a small loan company or a consumer credit granting agency which, by law, puts it out under its own special terms in small amounts.

Now, I said that always had seemed to me another distinguishing characteristic.

THE COURT: Yes, I think I remember discussing that with Mr. Henderson when he was on the stand the first time. I think it is pretty well covered.

THE WITNESS: Good.

BY MR. ZORN:

(576) Q. Mr. Henderson, I have no particular questions but if you have any comments with respect to the government's testimony which you consider you would like to make, would you go ahead and do that, or do you think—

A. Well, I only have one and since I got the greatest praise from Dr. Whittlesey, I am sorry that he is not here. But there was, after the praise, he undertook to read a statement of mine about the retail nature of this business, and he read further and, while he did not say so, he indicated that I had read out of context or that by saying in [414a] the last analysis or in the final analysis, I forget what it was, these companies are retail.

I would like to say that I went back over what he put in the record. I have no retreat from the quotation.

And, second, I would consider that if I said that in the last analysis that was a pretty final way of saying something.

That is all I have to comment on.

CROSS EXAMINATION.

BY MR. VOTAW:

(577) X Q. Quite a bit has been said about the Household Finance Company's being in retail business because it deals with the ultimate consumer. I would like to ask Mr. Henderson whether the persons who deal with the Household Finance Company he would consider an ultimate consumer because they consume the money which they borrow or because they use the money to purchase consumable goods or services or pay for consumable goods and services which they have already purchased?

A. I take it that when you say "consume the money," you are not being facetious, that they actually eat the dollar bills?

[415a] X Q. That is what I want to find out. Whether that is the reason they are called consumers.

A. Well, Your Honor, do I have to reply? I mean to a facetious question like that?

BY THE COURT:

X Q. He doesn't mean it exactly like that. What he

wants to know is: we have used that word "consumers" about these borrowers and one of the gentlemen on the stand, I don't remember who, said that money can't be consumed, and I don't think he meant it in a facetious way. I think he meant it from a scientific standpoint, that it isn't a consumable article. (578) I suppose that is true, isn't it?

A. I would be glad to concede that.

X-Q. Then he wants to know if that is so, why, on what basis you refer to the borrowers of small loan institutions as consumers. That is the basis of the question. That is all it is.

A. Well, we use the word—

X-Q. You don't consume the thing, again, unless they consume the service, I don't know—

A. They are consumers and we have used the term "consumptive loans." You see, they are loans for consumptive purposes, for buying predominantly the things that pass in the ordinary consumption goods.

X-Q. Well, that is what he wanted to know: consumers because they buy consumables with the money, I suppose, is that right?

A. Yes, certainly.

[416a] (579) X-Q. Now, just one more question, Mr. Henderson, if a state should pass a general sales tax laying a tax on all sales of services and goods recognized as retail in the industry, in your opinion, would such a tax be applicable to loans of the personal finance company?

A. In my opinion, if the state would be laying, in effect, a transaction tax of some kind, it would scarcely leave the small loan companies out of consideration.

Now, I am not up on what has been done in recent years in that particular field but certainly the question has come up on taxing these transactions. There was quite a consideration at one time towards the end of the N. R. A.—

I think I was on the committee but I didn't do much work about the pressure of consumer debt. And they were wondering if they couldn't pass a tax on the transactions there, all at retail rather than at the wholesale or the beginning line.

THE COURT: I just want to ask one question.

BY THE COURT:

X-Q. I am trying to get logically straightened out in my mind just one question and that is the value of the size of the operations. You have sort of put it in the offing or, rather, in the background, but you say you considered it. (417a) I wonder, really, whether it isn't tied up so closely (580) with the consumptive purpose test that it means practically the same thing? In other words, no consumer buys in such—or very few consumers buy in such—quantities that he could even resell and do something else with them. The ordinary consumer doesn't. Now, there may be exceptions there.

As I sit here, I thought of one of these huge western farms which might buy farm machinery in large quantities and might buy seed in enormous quantities. Suppose he bought thousands of bushels of seed, that would be enough to take care of hundreds of our smaller farms here. Was that a wholesale transaction although all for his own use, personally?

A. Well, at the

X-Q. There is a big transaction and I wonder if you would ignore the size of it—

A. I suppose you mean an individual farmer?

X-Q. Yes. I wonder if you would ignore the size of that transaction and make the fact that he is buying it for his own consumption the ultimate test?

A. Well, I think the test would be—he isn't buying that seed for his own consumption in the sense of eating it.

X-Q. No.

A. It is for his particular business. His peculiar business is farming, and I think you would find that in the Regulation (581) W that type of loan was not called a consumptive loan. That is—

X-Q. Well—

A. —where you had the agricultural cooperatives, for example, who would do that. They were not called consumption loans.

X-Q. Well, it is only a speculation. I was wondering when you boil it down, whether the size of the transaction doesn't become of very little importance, really...

[418a] A. The size of the transaction, as you say, is closely coupled with other things and one is the ability to repay, since it is very often partly on character, and the fact that he holds a job, things like that. But one thing which would make it fairly difficult for resale is the cost of it.

X-Q. Yes, sure, that is what I have in mind.

A. In order to make any money out of it, why, he is almost barred. Now, you will get some, as I said, from the Axis and even the credit unions and even the pawnbrokers that are used for business purposes.

Provident Loan Society in New York had a regular business of making loans on a Monday morning on jewelry that the loan money would be used in the business and then be redeemed on Saturday.

X-Q. Yes, I suppose—

(582) A. So that the women of the household took great pride in their jewelry to wear it and they had quite a volume of business. On the other hand, most of the pawnbroking loans as we know them are from people who are desperate for funds as to how they can get on as consumers.

RE-DIRECT EXAMINATION.

BY MR. ZORN:

Q: I just have one final question—just to clarify some suggestion Mr. Votaw made, Mr. Henderson. In order to

constitute a service within your concept of service, it doesn't necessarily have to be consumable or expendable, does it? In other words, let me put it to you this way: While you are staying at the Easton Hotel here, that hotel is classified by the Wage and Hour Administration as a retail service establishment and you are paying for the use of your room but you are not consuming that room, are you?

419a) A. No.

Q. And similarly with fur storage and other examples along that line.

A. That is right.

[420a] (The following occurred in chambers.)

MR. ZORN: The parties hereto by their respective counsel do hereby stipulate that if witness Paul Selby were called and sworn as a witness in this cause he (584) would testify that:

(1) From 1939 until 1944 he was the Chief of the Division of Securities in the Department of Commerce of the State of Ohio, which Division was in charge of administering the laws of the State of Ohio relating to small loan companies, credit unions, pawn brokers, and to security transactions; and

(2) From 1944 until 1945 he was the Director of Commerce for the State of Ohio, and, as such, was in charge of Divisions of Banking, Building and Loan Associations, Insurance, and the aforementioned Division of Securities; and

(3) From 1945 until the present date, he has been acting as the Executive Vice President of the National Consumer Finance Association, which is the trade association of the licensed small loan companies in the United States, which association maintains its office at Room 315 Bowen Building, 15 15th Street, N. W., Washington 5, D. C.; and

(4) As Executive Vice President of the National con-

sumer Finance Association he is the principal spokesman for that Association and its members; and

[421a] (5) Ever since 1939, by reason of his holding the aforementioned positions, he has been in constant contact (585) with all phases of the small loan business and has knowledge of the views and opinions of the lenders in such business and also with the views and opinions of members of related businesses such as banks, credit unions, sales finance companies, and similar institutions; and

(6) On the basis of his broad experience it is his opinion that the small loan industry considers itself to be a part of the financial industry as that industry has been defined in the testimony of witnesses Leon Henderson, Elmer Schmus, and J. P. Dreibelbis and that it is engaged in selling a retail service.

MR. WEINER: The Government joins in the stipulation.

United States Court of Appeals
For the First Circuit

AETNA FINANCE COMPANY,

DEFENDANT, APPELLANT,

v.

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor,

PLAINTIFF, APPELLEE.

RECORD. APPENDIX
TO
BRIEF FOR APPELLANT

VOLUME III.

Court Exhibit 3

(Pages 229-325)

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Court's Exhibit 3

Exhibits:

D-4 Publication of the Board of Governors of the Federal Reserve System entitled, "Sales Finance Companies," dated October 12, 1951 229

D-5 Articles and advertisements of Household Finance Company 235

D-7 Blueprint plan of the "City of Lancaster," dated March 10, 1949 323

D-8 Map, "Blue dots indicate residences of present borrowers from the Lancaster Office", etc. 325

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM

G.2

October 12, 1951

SALES FINANCE COMPANIES

AUGUST 1951

Retail financing—Sales finance company purchases of retail automotive installment paper rose 21 per cent during August, reflecting marked increases in the financing of both new and used passenger cars. New passenger car financing reached a level just under that of August 1950, but still considerably below the peak of June and July 1950. However, the gain in purchases of used passenger car paper brought used car financing activity to a new high, considerably above the previous peak reached in June of this year and much higher than the level of mid-1950.

Outstanding balances of retail automotive paper increased 2 per cent during the month. The gain since May 1951 brought retail automotive balances outstanding on August 31 to a level equaling the high point reached in October 1950, as shown by Table 1.

Purchases of other consumer goods paper were up 41 per cent in August. A large increase in the financing of refrigerators and household appliances, 54 per cent, was exceeded by the very sharp expansion, 78 per cent, in the financing of furniture, radios, television sets, and musical instruments. The other two classes of paper purchased also increased substantially in August.

Outstanding balances of other consumer goods paper increased 1 per cent during August, the first increase since September 1950.

Retail Financing by Sales Finance Companies

Class of retail paper	Percentage change, July 1951 to August 1951		
	Number of cars	Volume of paper acquired during month	Outstanding balances end of month
Automotive: Total retail	+14	+21	+2
Passenger cars: New	+19	+25	
Used	+12	+20	
Commercial cars: New	+7	+9	
Used	+12	+14	
Other consumer goods: Total		+41	+1
Furniture, radios, television sets, musical instruments		+78	
Refrigerators and other household appliances		+54	
Residential building repair and modernization		+24	
Miscellaneous retail		+12	

Wholesale financing—Purchases of wholesale automotive paper were slightly above those of the preceding month. Wholesale automotive balances outstanding at the end of August were about 9 per cent below the level of July 31.

The volume of wholesale financing of goods other than automobiles was somewhat below the preceding month's volume. Outstanding balances of nonautomotive wholesale paper continued to decline moderately in August.

NOTE—August data, based on returns from 109 sales finance companies, are compiled in the same manner as those shown in earlier reports. Aggregates represent only the totals for the reporting companies and, since the reporting sample is not identical from month to month, they are not comparable with totals of preceding months.

EXHIBIT D 4 (434 a)

Note:

Even-numbered pages 230 - 273 are blank.

SALES FINANCE COMPANIES

Table 1.--Automotive and Diversified Financing by Sales Finance Companies
Indexes of Outstanding Balances: December 31, 1939 - 100 %

End of month and year	Total all sales financing	Retail automotive	Wholesale automotive	Wholesale other than automotive	Retail other consumers' goods	Industrial, commercial, and farm equipment
1939.....	100	100	100	100	100	100
1940.....	136	132	169	140	129	131
1941.....	152	149	175	250	148	147
1942.....	53	37	112	40	76	61
1943.....	20	13	40	8	30	27
1944.....	18	15	24	11	26	26
1945.....	22	18	27	38	39	23
1946.....	59	42	90	224	105	59
1947.....	119	88	163	394	226	89
1948.....	174	151	252	454	232	116
1949.....	228	249	216	332	187	107
1950.....	291	325	296	516	177	130
1950-August.....	274	322	179	424	189	124
September.....	282	330	192	422	192	127
October.....	288	331	240	435	188	128
November.....	291	328	280	478	182	132
December.....	291	325	296	516	177	130
1951-January.....	287	320	291	648	171	132
February.....	286	315	306	759	166	134
March.....	290	312	356	906	161	125
April.....	294	311	382	943	156	136
May.....	298	316	401	899	153	138
June.....	302	321	405	824	150	140
July.....	298	324	372	737	146	143
August.....	299	331	339	638	148	146

a/ Indexes as of December 31 for the years of 1939, 1940, and 1941 are based on figures reported by sales finance companies on a supplementary report form which accompanied the regular monthly report form for January 1942. Succeeding indexes are derived by calculating the percentage changes of the outstanding balances reported by sales finance companies for each month from those reported by the same companies for the preceding month, and by linking these percentages to the indexes for the preceding month.

Table 2.--Relative Importance of Loans Made by Sales Finance Companies
During August 1951 and Outstanding Balances at End of Month

Class of paper	Paper acquired during month		Outstanding balances, end of month	
	Amount	Percentage of total	Amount	Percentage of total
Total, all classes of paper a/.....	\$978,994,234	100	\$3,674,136,202	100
Total loans.....	90,183,212	9	236,691,152	6
Small (personal) loans.....	29,183,296	3	119,530,538	3
Business loans.....	60,999,916	6	117,150,614	3
Total sales financing a/.....	888,811,022	91	3,437,445,050	94

a/ Included in this classification are only those firms which, in addition to their sales financing operations, reported loan activities.

Table 3.--Automotive and Diversified Financing by Sales Finance Companies
Paper Acquired During August 1951 and Balances Outstanding at End of Month

Class of paper	Volume of paper acquired during August 1951		Outstanding balances August 31, 1951 a/	Ratio paper acquired to outstanding balances b/
	By all companies reporting	By companies reporting outstanding balances a/		
Total retail automotive.....	\$474,744,366	\$470,492,286	\$2,591,827,636	15
Total wholesale automotive.....	447,164,449	444,374,323	526,334,753	84
Total wholesale - other than automotive.....	11,245,588	17,887,126	47,781,942	23
Total retail - other consumers' goods.....	32,256,777	29,095,209	219,758,533	13
Industrial, commercial, and farm equipment	17,332,784	10,121,634	106,952,742	9
Total sales financing.....	\$975,773,964	\$894,963,578	\$3,494,648,606	26

a/ Data are based on figures from sales finance companies able to report both their paper acquired and their outstanding balances.

b/ Ratios obtained by dividing paper acquired (column 2) by outstanding balances (column 3).

Table 4.--Number of Cars Financed and Volume of Paper Acquired
by Sales Finance Companies During August 1951

Class of paper	Number of cars		Paper acquired	
	Number	Percentage of total	Dollar volume	Percentage of total
Total retail automotive.....	304,474	100	\$393,898,563 a/	100
New passenger cars.....	111,549	29	167,493,595	41
New commercial cars.....	17,667	5	25,078,483	6
Used passenger cars.....	236,604	61	194,719,371	49
Used commercial cars.....	18,654	5	13,677,104	4
Total wholesale automotive.....	276,786	100	\$441,083,843 a/	100
New cars (passenger and commercial).....	231,486	84	396,928,332	97
Used cars (passenger and commercial).....	44,600	16	44,155,511	17

a/ Data are based on reports from sales finance companies providing a breakdown of their retail and wholesale automotive financing. These amounts are less than those reported in table 3 due to the exclusion of some data for which breakdowns were not available.

Table 5.--Volume of Diversified Sales Financing During August 1951

Class of paper	Dollar volume of paper acquired	Percentage of total
Retail - other consumers' goods:		
Furniture, radios, pianos, and other musical instruments.....	\$ 5,645,857	11
Refrigerators and other household appliances.....	13,779,827	25
Residential building repairs and modernization.....	4,574,599	8
Miscellaneous retail.....	7,564,778	15
Total retail - other consumers' goods.....	\$37,625,477 a/	59
Total wholesale - other than automotive.....	11,245,588	21
Industrial, commercial, and farm equipment.....	17,332,784	27
Total diversified financing.....	\$52,273,419	100

a/ Data are based on reports from sales finance companies providing a breakdown of their retail financing of other consumers' goods. This amount is less than that reported in table 3 due to the exclusion of some data for which breakdowns were not available.

EXHIBIT D 4 (436 a)

The Banker...confidential

Adviser to Business



*Personal Finance managers
are counsel...to the heads
of the nation's families*

THE banker serves as confidential adviser to business—concerned mainly with management, materials and methods. The banker is a dealer in credit in large sums. Personal Finance Corporation is a retailer of money, in units of \$300 or less. The loans are repaid in small amounts, arranged to suit the financial situations of their millions of customers.

For more than 80% of the nation's families, Personal Finance Companies are the source of supplementary credit—of paying power—so valuable and so necessary in periods of family financial stress.

The business of Household Finance Corporation is with people—their needs, their desires, and in most cases their emergencies. Household Finance Corporation managers act as intimate financial counsel to their customers, helping them consolidate and pay pressing obligations, organize and budget income, and resume their going order in the community.

R. Eldarson
PRESIDENT
Household Finance Corporation

What the Nation's Leaders should know about today's Small loan Business

THIS IS ONE OF A SERIES ON

PERSONAL FINANCE COMPANIES operate in those 25 states which have adopted the Uniform Small Loan Law, developed and sponsored by the Russell Sage Foundation, a social service research organization. Household Finance Corporation, largest and oldest personal finance company in the world, operates through 150 wholly owned branch offices, located in 71 cities, in 12 states. It serves more than 315,000 families annually.

Loan Policy: Through 52 years, Household has safeguarded the interests of its customers; encouraged organization of family finances, budgeting of income and preservation of credit responsibility. In no way is improvidence or unnecessary indebtedness encouraged.

Loan Cost: Retailing small sums at basic rates of interest, it is impossible to retailing cost by the dollar at other rates. Compare 1,000 loans of \$100 each, earning 12,000 monthly per-

*Not the risk of loss of principal, but the high overhead cost of loan-making.

ADVISER TO BUSINESS



*Personal Finance managers
are counsel...to the heads
of the nation's families*

THE banker serves as confidential adviser to business—concerned mainly with management, materials and methods. The banker is a dealer in credit in large sums. Personal Finance Corporation is a retailer of money, in units of \$300 or less. The loans are repaid in small amounts, arranged to suit the financial situations of their millions of customers.

For more than 80% of the nation's families, Personal Finance Companies are the source of supplementary credit—of paying power—so valuable and so necessary in periods of family financial stress.

The business of Household Finance Corporation is with people—their needs, their desires, and in most cases their emergencies. Household Finance Corporation managers act as intimate financial counsel to their customers, helping them consolidate and pay pressing obligations, organize and budget income, and resume their going order in the community.

R. Eldarson
PRESIDENT
Household Finance Corporation

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Household Finance Corporation

1928-1929 OFFICIAL EXHIBIT D 5 (a) (437a)

An Interview With L. C. Harbison

By BILL (WM.) UNDERWOOD



L. C. Harbison

IMAGINE for a moment," I said to Mr. L. C. Harbison, president of Household Finance Corporation, "that you had all the newspaper men and women of Chicago together in one room. Is there anything you would like to say to them?"

"Indeed there is," replied Mr. Harbison who heads the leading personal finance corporation in America which is lending small sums annually to more than 300,000 families. "My business owes its existence in large part to newspaper writers who some fifteen years ago realized the necessity of providing legal facilities where families, unable to obtain bank credit, could borrow small sums to meet their urgent necessities. Until that time usury laws had prohibited the making of such small loans because the rate permitted under the usury laws was not sufficient to pay the costs of making and collecting them in monthly installments.

"In those days when a family needed two or three hundred dollars to pay accumulated debts or medical bills, or to finance a business or educational opportunity, it was practically impossible to obtain the necessary funds. The business of lending such sums was outlawed. Money 'bootleggers' peddled small sums of \$25 to \$50 at bootleg prices, but such loans were of little value to the recipient. These 'bootleggers' did not finance families but kept them in financial slavery.

"With the passage of the Uniform Small Loan Law the retailing of money to finance families in Illinois came into existence for the first time. Naturally when money is sold in small amounts it must first be borrowed from the bank at the bank rate and then distributed to innumerable families with investigation costs and must be collected in weekly or monthly installments. It is no more possible to lend small sums at the bank rate than it is to sell coal by the basket at carload prices. Banks are essentially wholesalers of money making their profits on large loans to commerce and industry.

"However, the service we render is enabling families to pay their way out of debt, to meet their own emergencies and stand on their own

feet. The profits we make are no higher than are necessary to attract capital into other forms of necessary business. Economists, social workers and bankers generally agree that the service is valuable and the rates charged are reasonable.

"Now the public generally does not stop to appreciate the radical difference between the old situation and the new. Most people have been educated that 6 per cent, the bank rate, is the proper price of money, without regard to the size and conditions of the loan. They do not stop to realize that it costs just as much to make a \$50 loan as it does to make a thousand dollar loan and yet the gross interest on a thousand dollar loan at the same rate is twenty times as great. The public generally will continue to apply epithets such as 'loan shark,' 'Shylock' and 'usurer' to a necessary and legitimate business until they are educated to make a clear distinction.

"Household Finance Corporation is endeavoring to lend these small sums at the lowest possible rate, consistent with sound business policy. In order to obtain capital as cheaply as possible it is important that public prejudices be overcome. Household is applying itself to this task and is only asking fair play and honest investigation at the hands of writers everywhere. Our books and our methods of charge are an open book.

"I would, therefore, request an impartial investigation before newspaper men and women associate in their minds or in their writings the necessary legal licensed personal finance company, charging 2½ and 3½ per cent a month on small loans, with the 'shylocks,' the 'loan sharks' and the 'usurers.' I would like to have the writers realize the truth which is that the personal finance business is a new business created by the Illinois legislature and the legislatures of twenty-five other states. It came into existence because legislators finally appreciated the fact that the American family, no longer raising its own food and making its own clothing, has become dependent upon a money income to meet its regular living expenses; that when this money income is irregular due to sickness or unemployment, or when sudden emergencies arise calling for extraordinary expenditures the present day family must have an opportunity to borrow.

"The personal finance business has grown in the United States since 1913 under strict state regulation to a position where its place in the business and economic system is thoroughly established. Its further development, the reduction of its charges and improvement of its service to society depends largely upon a wider public appreciation of its value and significance, and freedom from those prejudices which should only be associated with the outlawed and illegal money 'bootleggers.'

"If I had Chicago newspaper men and women in a room together these are the things I would say to them, frankly and confidently, because I know that there are no more fair minded public spirited citizens in our city."

Reprinted from September issue of "Scoop," Special organ of The Press Club of Chicago.

The Cost of Making Small Loans

Reprinted from
AMERICAN FEDERATIONIST
April, 1931

The Cost of Making Small Loans

In October, 1928, Household Finance Corporation made a voluntary reduction from the 8½ per cent a month permitted by most state laws, to 2¼ per cent on all loans above \$100 and up to \$300 (the maximum amount which can be loaned under the Uniform Small Loan Law). Loans in amounts of from \$50 to \$100 are made at the maximum rate permitted under state law. Even at that rate, \$50 loans are not directly profitable, but are carried as an advertising expense.

How Costs Determine Rates

It is the cost of investigation, carrying, and collection that makes small, unendorsed loans relatively far more expensive than ordinary commercial bank loans protected by collateral security. Retailing small sums at bank rates of interest would be as impossible as the retailing of coal by the basket at carload prices.

When a bank loans \$250,000 to a business man on good security, the transaction requires a certain expenditure of time and overhead. But if the same sum is loaned in amounts of \$125 to each of 2,000 people who do not have established bank credit or salable security, expenditures for overhead are increased in proportion to the number of loans made. One must rent and maintain a good-sized office and employ a trained staff of six or seven persons—all of whom are kept busy making the loans and collecting the 24,000 or more monthly payments during the year.

For example, during 1930 Household had an average of \$327,000 capital employed in each office. Salaries of a manager and six assistants, together with rent for such an office cost \$16,000 per annum, or about one-third the total cost of operating the average office. Other costs which are similar to those found in any retail business include, office supplies, telephone, telegrams and postage, car-

fare, auto and traveling expense, auditor's fees, insurance, taxes, bad debts, advertising, and supervision.

The cost of supervision which includes all headquarters' salaries as well as traveling field supervisors, now amounts to a monthly cost of only thirteen one-hundredths of one cent per dollar employed. Advertising involves a monthly cost of only eighteen one-hundredths of one cent. Elimination of either of these items would decrease volume of money loaned and efficiency of operation, and thereby increase the cost far more than would be saved by their elimination.

While theoretically gross interest of 30 per cent should be collected on employed capital it is impossible to keep the capital constantly employed. During 1930 the per cent of gross interest received on employed capital was 25.88 per cent instead of 30 per cent. When operating costs are deducted, the remainder for payment of interest on borrowed money and dividends is not nearly as great as the average profit in successful retail businesses.

Cost Variations

Costs of operation per dollar loaned by personal finance offices show wide variations due to cost of money, nature of territory and population served, size and number of loans made, and efficiency of personnel. Household's operation costs during 1930 showed a very considerable difference between its most profitable and its least profitable offices. Both offices had been in operation for years; both had as large loan balances as they could handle effectively; both were manned by an efficient personnel. The chief difference was in the territory and population served, which resulted in a smaller number of accounts handled per employee in the less profitable office.

Accessibility of the homes of customers to the loan office, size and regularity of

income, standards of living, spending and paying habits of families—these factors determine the size of loans, and the number of accounts on employee can handle, which in turn affect all the costs of carrying on a personal finance business. The cost of making and carrying a \$300 loan and a \$50 loan differs only slightly, yet the income from the \$300 loan is six times as great as from the \$50 loan. According to the most careful cost analysis, Household would find it necessary to charge 5 per cent a month on \$50 to make an average profit on the transaction.

If an employee can handle only 200 active accounts, and these are paying interest on balances averaging \$50, that employee is bringing in gross interest on \$10,000. But if he can handle 350 accounts averaging \$150, he is bringing in gross interest on \$50,000—five times as much, although the costs of operation are nearly the same.

Household's Advantages

Thus it will be seen that profits increase with the number and size of the loans handled per employee. However, the point of diminishing return is soon reached. Few offices can handle as many as 350 accounts per employee, and the size of loans is limited by law to \$300. The average loan balance due from customers seldom exceeds \$150 in an office. Lending money to persons without endorsements or other bankable security is a personal service, not a mass production industry.

Household charges practically the same interest rate in all its branch offices in 75 cities, because it can control cost variations within reasonable limits. It has the advantages of uniformly efficient, trained personnel, uniform cost of money, and carefully selected branch office locations. Also its more profitable offices make up for the higher expenses of those less profitable. Should competition in the better locations force a lower rate, it might be necessary to raise the rate in less favorable locations. Even now there are hundreds of communities needing small loans which Household cannot serve at its 2½ per cent rates.

Effect of Price Fixing

The rate established in the Uniform Small Loan Law was intended only as a maximum. Competition, and the costs of operation, were expected to determine the actual going rate. Price fixing by legislation cannot accomplish more than this. Were the rate fixed at a point where only the most efficient and favorably located organizations could do business, capital would seek other fields, healthy price competition would be eliminated, companies like Household would have less incentive for further rate reductions, and many worthy people would be left without loan service.

Experiments in reducing the legal maximum interest rate to 2½ per cent a month have always deprived many families of the privilege of borrowing sums under \$100, while states which have limited the rate of 2 per cent or less, have driven the legal, regulated business out of existence. However, a reasonable graduated reduction on loans above \$100 would not materially restrict the source of proper personal credit.

Household is constantly endeavoring in every way possible to reduce its operation costs. This organization will continue to maintain its leadership in efficient administration, and in meeting the needs of its customers at the lowest possible interest rate consistent with good business practice.

Household Finance Corporation

919 North Michigan Avenue

Chicago, Illinois

[Reprints of this series of advertisements will be mailed on request addressed to the Division of Research.]

Money can't be retailed at bank rates

SOME YEARS AGO the Russell Sage Foundation recognized the widespread importance of financing families who find themselves temporarily short of needed funds. In studying the problem this philanthropic institution gave special attention to the question, "What should such loans cost?" As a result of this study, the Foundation advocated several plans improving upon the then existing conditions, among which was a Uniform Small Loan Law which provided for a maximum charge of 3 1/4% a month on the unpaid balances of remedial loans up to \$300.

This rate may seem high to those who do not realize that the bank rate is a "wholesale" rate, charged usually on large loans to finance industry and commerce. Upon deeper thought, it will be seen that the charge for small loans cannot be compared with bank interest. The small loan charge is a "retail" price for supplying money in "broken lots."

A \$20,000 loan may be made on good security by a bank at one rate of interest. But, obviously, it costs much more to lend the same amount of money to 100 people in amounts of \$200 each, (Household's average loan).

The handling of 100 interviews, 100 investigations, and 1,200 monthly payment collections during a year is much more costly than one interview, one investigation, and one collection.

Just as coal retailed in small lots is much higher per ton than when sold at wholesale by the carload, lending money in amounts under \$300 is a retail business involving much higher operating costs than bank loans.

No law restricts the retailer of goods on the gross profit he may charge. A merchant in food or furniture determines his selling price by adding to his wholesale cost a sufficient mark-up to pay operating expenses and show a fair profit.

The laws of some 26 progressive states specify a certain charge per month on unpaid loan balances as the maximum mark-up which the money retailer may add to cover his operating costs and profit. He may not deduct his charges in advances as banks do. He may not impose fines or extras for anything.

Household Finance Corporation has met every emergency with these requirements; it was able over three years ago (because of large volume and efficient management) voluntarily to reduce its rates, on amounts above \$100 and up to \$300, substantially below the lawful maximum permitted by most state small loan laws.

Few companies could retail money profitably at equally low charges. Household's impressive success and steady growth (363,851 families were served by 149 Household offices last year) evidence the ability that has won leadership in its field.

HOUSEHOLD FINANCE CORPORATION and Subsidiaries Palmolive Building, Chicago

Mr. Household urges the readers of this magazine to compare themselves with the economics of the business of retailing money and with its economic importance to our national welfare. Further facts will be published in this series of advertisements. Any information will be sent gladly on request.

One Hundred Forty-Nine Offices in Ninety-One Cities in:
IOWA GEORGIA MARYLAND MASSACHUSETTS MICHIGAN MISSOURI
NEW JERSEY NEW YORK PENNSYLVANIA RHODE ISLAND WISCONSIN

Hear the Household Hour every Tuesday Evening at Eight Central Standard Time on the NBC Blue Network

CHARLES DANIEL FREY COMPANY, Advertising, CHICAGO

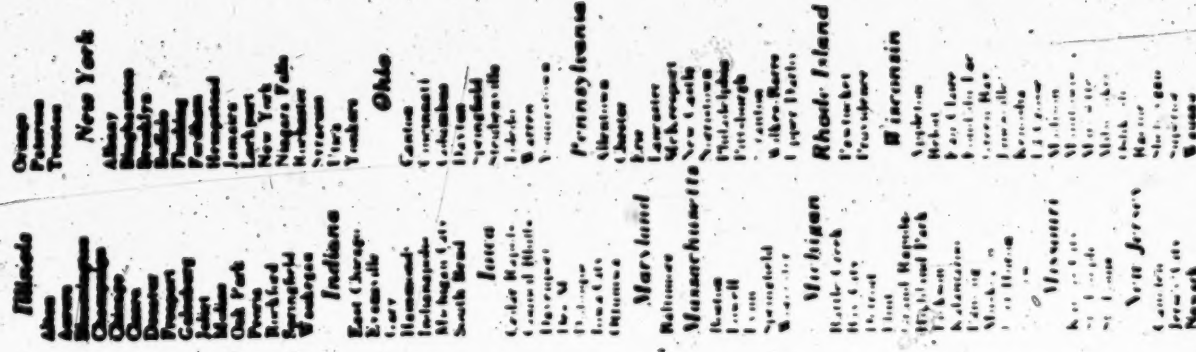
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If mail or plate is not received, advise agency.

Not a business transaction. Copy No. 367-3660-819 11 in.-(E)

Fortune, March, 1932

As Appearing in Fortune in 1932
EXHIBIT D 5 (d) (4442 a)



LUCKY FELLOW! He has a job—a pay envelope every week! Lucky Fellow? Henry is not so sure. He is glad to have a job but Henry can't see how to spread out his pay in a way to satisfy his creditors, buy food for the family, pay carfare and keep him going until next pay day.

Several million Henry Millers have gone back to work—most of them with this same perplexing problem. They can't solve it alone. But it is simple with the help which these families, as going concerns, have a right to command.

Many a Henry Miller and his family are being refinanced by a Household loan . . . enabling them to consolidate and pay their debts . . . helping them budget their income . . . re-establishing their self-respect . . . making better employees and citizens of them.

For many years, Household has devoted its abilities and experience to the task of supplying the consumer with needed cash to meet emergencies and opportunities . . . cash at the lowest possible cost consistent with sound business policy.

Business men know a retail price must cover operating costs plus a reasonable profit. No amount of efficiency can reduce the price of retail loans such as Household offers to the level of wholesale loans made by banks. However, when methods are devised which permit renting the use of money to families at rates lower than the 2 1/2 to 3 per cent a month now charged on unpaid balances, Household will be found using such methods.

Headquarters: Palmolive Building, Chicago, Illinois

about called in back to the camp in one, leading to the happy
 of them, as well as others, to change to your employees
 a letter. We will be in the future, to our hearts at other

**MONEY MANAGEMENT
FOR HOUSEHOLDS**

Club Women Turn Light on Consumer Credit

*Institutional
Advertisement*

Reprinted from
AMERICAN FEDERATIONIST
FEBRUARY 1935

R-102-2-38

EXHIBIT D 5 (g) (445a)

Club Women Turn Light on Consumer Credit

"A sane understanding and acceptance of causes for credit price is the way to reduce . . . unnecessary costs."—From "Handbook for Industrial Forums" published by the Division of Industry, General Federation of Women's Clubs.

Club women throughout the country are engaged in a study of consumer credit. The Division of Industry, General Federation of Women's Clubs, has issued a "Handbook for Industrial Forums" containing this unusually enlightening analysis:

"The study of consumer credit has three main objectives: (1) To promote the education of consumers with reference to the policies governing extension of different types of consumer credit and the prices charged for each; (2) to assist in the proper solution of all credit problems affecting consumers; (3) to secure and to disseminate accurate information with reference thereto.

"What Is Consumer Credit?"—Consumer credit as defined and limited for the purposes of this study is the name applied to small loans repayable in small amounts and differs from commercial credit as retail differs from wholesale. It does not apply to open or 30-day credit or that of retail stores or to real estate credit, such as building and loan associations.

"Before any progress can be made in studying consumer credit, the

mind must be free from the popular superstitions concerning this subject. Until people recognize that consumer credit does not and can not follow the rules and customs pertaining to commercial credit transactions, they will not be in a position to use it easily and economically. When a consumer buys furniture, clothing, food, he does not question the legitimacy of prices higher than those paid by wholesalers for these same goods. A similar intelligent comprehension of money costs and charges may be expected to lead to important advantages to both dispensers and users of consumer credit.

"Agencies Offering Consumer Credit"—These agencies may be classified as:

"(1) Agencies which make direct loans of money.

"(2) Agencies which extend credit in order to facilitate sales of merchandise . . .

"Cost of Consumer Credit"—Many people have formed the habit of comparing the price of consumer credit with that of commercial credit. But, even for those who bear in mind the important fact that credit to the consumer is retail credit, while that to industry is wholesale credit, there remain many

problems. Installment credit is usually offered under terms that conceal its true price. This is true because the public does not understand the need for higher rates on retail than on wholesale credit deals. But of still greater importance to consumers is the fact that these costs are often held unnecessarily high because of unintelligent criticism by consumers which unnecessarily increases the costs of litigation and explanation. A sane understanding and acceptance of causes for credit price is the way to reduce these unnecessary costs.

"Who Uses Consumer Credit?"—Consumer credit has become a national institution. It is not confined to any one class or group. . . . Even the wives of captains of industry frequently resort to small loans and to installment sales. Many a person who is critical of consumer credit as an institution . . . resorts to its use.

"Is Consumer Credit Justifiable?"—It has frequently been said that wage-earners have no right to borrow money . . . that installment sales are responsible for demoralizing those who buy with their help, and for undermining the economic soundness of the nation. . . . Such charges should not go unregarded. If they are true, steps should be taken to abolish these evils. If they are false, institutions dealing in consumer credit should be aided in freeing themselves from the costly effects of public misunderstanding.

"What Improvements Are Needed?"—Are we content with consumer credit as we have it today—

its rates of charge, its scope of service, its statement of costs? Are we content to leave it in its present state of control or lack of control . . . ? We now have at least one conspicuous instance of such credit as dispensed by the United States Government. . . . What the problem needs is understanding, both of its concealments and of the remedy for them.

"There is excellent reason for believing that, once this has been accomplished, we may expect to see consumer credit existing only for such real values as it offers, and truly purged of those weak and objectionable traits now inherent in some of its forms.

"What Can Club Women Do?"—

(1) Study the types of consumer credit in their own communities . . . ; (2) discuss consumer credit with dispensers and users; (3) work for agreements with dispensers of installment credit; (4) work for regulatory state legislation."

HOUSEHOLD FINANCE CORPORATION

"Your Doctor of Family Finances"

**919 North Michigan Avenue
CHICAGO, ILLINOIS**

(Reprints of this series of advertisements will be mailed on request to the Division of Research.)

EXHIBIT D 5 (g) (447)

What Do You Pay for Money?

An Analysis of the Small Loan Business

P 88

257

USURY IS ONE of the most unpleasant words in the English language. It connotes vileness and dishonor; it calls up a mental picture of clutching, greedy hands, of an aging wretch cackling in glee as he counts the stacks of gold coins he has wrested from the honest sweat of other men.

Until a few centuries ago, usury meant the taking of interest in any amount, instead of its present meaning of charging exorbitant rates. There was, at that time, virtually no interest as we know it today. Most loans were made to supply the necessities of life, and the general feeling was that one who profited by the misfortune of another was beyond the pale of decent humanity.

Murder, peonage, *le droit de seigneur*, foolish wars between small principalities, crushing taxation, and a thousand other abuses were tolerated in the middle ages, but there were ecclesiastical and moral bans on the loaning of money for interest. With a few exceptions, only Jews, who were considered and treated as pariahs, and the Lombards who established a famous banking system, were permitted to make interest bearing loans. The frenzy of those days needed financing from time to time to conduct their little military expeditions against their neighbors, and to make high whoopee, but they would permit only the untouchables, whose souls were already lost, to jeopardize their immortality by indulging in the iniquitous practice of usury.

With the rise of industrial civilization, the picture changed. It gradually became evident that liquid capital was necessary to finance trading and manufacture, and the making of commercial loans became a respectable business. Slowly the interest rates became standardized, and a figure of six to eight per cent a year became the accepted rate of fair dealing for a good commercial risk. It is on this general assumption that most of the usury laws in force in the United States prior to 1916 were based. They were excellent for the larger commercial loans and for mortgages on sound security, but they took no account of the little fellow who needed small sums and had no bankable collateral.

IN EVERY FAMILY of moderate means there comes a time when a few extra dollars are imperative. Sudden illness,

By
TED LEITZELL

temporary loss of employment, unwise accumulation of debts, and many other untoward events may throw the family budget out of balance.

Banks cannot profitably make small loans, even with sound security, because the actual cost of handling the account is greater than the few dollars interest they would receive under the commercial interest system. Pawn

tunes from illegal traffic in liquor during prohibition. Because the average citizen doesn't understand a great deal about interest rates, the amounts collected were out of all proportion to the value received. Five dollars borrowed on Monday would be repaid with six dollars on Saturday. An eighteen dollar pay check due on Friday would be sold for twelve dollars a few days earlier. A fifty dollar loan would draw interest at the rate of five dollars a month, with a commission of five or ten dollars when renewed. Abuses were unspeakable, but it would

Commonwealth of Massachusetts

DEPARTMENT OF BANKING AND INSURANCE

DIVISION OF BANKS AND LOAN AGENCIES

Bureau of Loan Agencies

STATE HOUSE, BOSTON, MASS.

CERTIFICATE

This I hereby certify

My duly licensed to engage in the Small Loans at

in Chapter 140 of the General Laws, amendments thereto and all other laws
to said business, and is subject to all of the provisions of said General Laws and to a
regulations and orders made by the Commissioner of Banks in accordance therewith

David B. Dwyer
Superintendent of Loan Agencies

Look For This License!

If you borrow in a state with a small loan law, insist on seeing a license before signing any papers.

shops are available, but few families in these circumstances have enough jewelry, cameras, etc. which are readily pawnable to raise any appreciable sum. For the necessary amount, which may range anywhere from twenty to three hundred dollars, our embarrassed friend must borrow from some one who will profit by the loan.

With the old usury laws in effect on all loans, he fell into the hands of loan sharks, and what a trimming he received! Because their business was illegal, they had to make excessive profits, just as gangsters made for-

be futile to attempt a complete catalog of them.

In 1907 the Russell Sage Foundation began its investigation of the small loan problem. It recognized that loans of \$300 and less were of vital importance to millions of families, and that they were essential in clearing trade channels by cleaning up old indebtedness. It also recognized that small loans without adequate security were far more costly to make in the terms of the orthodox "per cent" than the large loans made by banks to industries. The problem became one of de-

EXHIBIT D 5 (h) (448 a)

termining what type of legislation would make it possible for loan agencies to be established which would serve the double purpose of attracting legitimate capital and of protecting the borrower from exploitation.

By 1916 it had prepared as a model the Uniform Small Loan Law, which has since been adopted in its essential details by 29 states. Some of its provisions have been modified by different states, and it has been redrafted five times as experience has suggested changes, but in general it provides that:

All lenders shall be bonded and licensed, and supervised by a state department, and open to inspection at all times.

The borrower shall receive the full amount of the note with no discounts, fees, or other hidden charges.

Interest can be charged only on the unpaid balance, month by month.

Compound interest is forbidden. The borrower may increase his payments and save interest.

The maximum rate is never over 8½% per month; in many states this rate is allowed only on the first \$100 to \$150, with 2½% allowed on the balance. Many states have a maximum of 3%.

IN THE EARLY drafts of the law, the Russell Sage Foundation recommended the 3½% rate on all balances up to \$300, but no longer suggests it on the larger balances. The Foundation does hold, however, that the allowable maximum rate in any community should not be less than 3% on balances up to \$100 and 2½% above.

Compared to 6% or 8% per year these rates seem inordinately high. Nevertheless, they were the recommendations of a disinterested research organization, reached after careful study. When one considers that it takes 250 loans of \$100 each to equal one \$25,000 loan, that with each small loan there is a multitude of investigations and a series of bookkeeping transactions that must be made every month, and that the security back of the small loan is much less than the collateral offered a bank for a \$25,000 loan, the figures do not seem so high. If they were the worst terms offered a prospective borrower, there would be little or no need for discussing loan sharks. How these legal licensed agencies work in practice will be considered later.

IT IS UNFORTUNATELY true that the most vicious kind of small loan practices are still carried on by outlaw lenders in many places. Within the past few months Special Prosecutor Thomas E. Dewey, of New York, has brought convictions against nearly 30 of the most heartless loan sharks in history. These splendid gentlemen secured the aid of racketeers who had

found the world rather unprofitable since repeal. Their peculiar talents were invaluable in collecting usurious interest and in frightening the borrower into silence.

Two notorious characters, Sam Kurland and Sam Faden, were recently convicted by the efforts of Mr. Dewey after a career that seems unbelievable. They made loans with interest rates as high as 20% per week, which is over 1000% per year. They would make loans anywhere from \$5 to \$100 or more, and were johnnies-on-the-spot to collect their interest and principal. If they did not collect promptly, they gave their victims "the works," beating them and threatening them with everything from cutting off of ears to murder.

One man, named Alexander, was hooked first by Kurland. After an involved series of transactions it worked out that he paid \$183 for a loan of \$85. In trying to square himself with Kurland he borrowed \$75 from Faden, for which he paid interest of \$15 per week. In desperation, after

the states which have not adopted the Uniform Small Loan Law. The inside operations of one of these chains recently was brought into the light when its officers were caught in a legal net and forced to give depositions before a court commissioner.

In Milwaukee, the National Accounting Company, owning a business which had been continuously operated by the late L. A. Wagner since 1914, until recently closed out, operated a chain of 45 loan offices in a dozen states, charging interest at upwards of 10% per month. These offices were usually registered in the name of some obscure clerk or other person living in a distant state where he could not be reached for legal action.

The vice-president of the company testified that the average loan was for \$22, and that the average interest was \$7.50 to \$8 per month, or at a rate of from 410% to 435% per year. Detailed methods of operation differed slightly in various states. In Nashville, for example, the Central Discount Company made loans of \$14.75, but received a demand note for \$22.50. This was usually repaid at the rate of \$2 per week, making an interest rate of over 600%.

In Mobile, Alabama, the Wagner outfit had the Employees Finance Company. Here M. R. Duke borrowed \$20, for which he was to pay back \$27. However, he fell behind after repaying \$17, and was dunned persistently. Eventually he was sued and had to pay the company lawyer \$26, and total claims from the Wagner Company made his debt grow from the original \$20 to a total of \$65.

The company had two other cute little tricks: First, they made a practice of paying a dollar for every new borrower a customer sent in. Second, they did not return the customer's note when he had paid up; instead, they tore off the signature and gave that to him, destroying the other records.

Before it was exposed, the loan chain was the financial backer of an organized and fake reform plot to defeat or nullify the Uniform Small Loan Law. Their goal, with the law and legal loan companies out of the way, the Wagners would be free to become the country's king-pin outlaw money lenders.

Employing Charles R. Grant, propagandist and organizer, Chicago, who posed as a reformer and operated as a writer and unregistered lobbyist, they were successful in reaching into Congress, state legislatures, the press, and sometimes pulpits, deceiving sincere people into helping them.

Bank drafts, correspondence, and other records uncovered during the taking of depositions definitely show

(Continued on page 88)

WHAT DO YOU PAY FOR MONEY?

that Grant was financed by the Wagner chain; that he used aliases in his work, and was the author and publisher of magazine articles and a book, "The Small Loan Racket," a widely circulated attack on the Uniform Small Loan Law and the loan companies it licenses and regulates.

If a borrower is unable to get a fair deal from such outfits as Wagner's, where can he make a small loan under fair terms? How does the Uniform Small Loan Law work out in practice?

Credit unions which make loans at moderate rates of from 6% to 12% per year have been organized in a number of industries. Similar plans are in effect in cooperatives, etc. They rely for collection on the group pressure of their membership and on the employee's continuity of employment. They have little operation expense, as practically all services are donated by the officers. They are excellent, for those who are able to join, and when well managed they pay nice returns to the employees who invest in them. But, unfortunately, they are unable to supply the general demand. There are too many persons to whom membership in such a cooperative is not available.

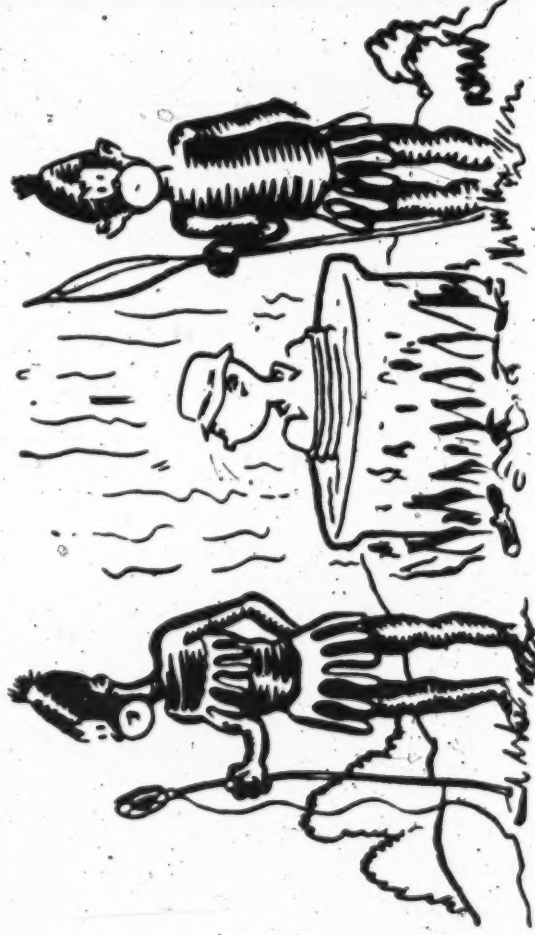
There are a number of small loan companies in operation throughout the country on a co-signer basis. These include the Morris Plan Banks and such organizations as the Personal Loan and Savings Bank, of Chicago. They make loans on notes which have two or more co-signers who guarantee repayment. Rates vary from 7% to 8% per year on the principal amount, with fees in addition in some cases. These rates seem low, but the customer does not have the use of all the money all of the time, since he is paying it back in monthly payments. The actual rate on the money used ranges from 12% to 30% per year.

However, credit unions and banks of the character described above do little to eliminate the loan shark evil. There are still millions of families who cannot or do not belong to credit unions, and more millions who are unable or unwilling to obtain co-signers for their notes. These are the people for whom the Uniform Small Loan Law was written. Let us see how it works. Is it a success?

IN THE STATES where this law is in effect the chap with a job or income who is temporarily in straitened circumstances has his choice of several legal loan companies. Here he can borrow, provided he passes the requirements of the particular company, any amount up to \$300. He pays it back in equal monthly installments, with interest at the agreed monthly rate on the money he has used. If he becomes delinquent he will be followed up vigorously, but he is in no danger of being kidnapped or beaten. The big advantage to him is that the large corporations, backed with reputable capital, observe the law to the letter.

There are a number of well financed legal loan companies in the business. A study of their records will show clearly whether or not they are exploiting the borrower, and will give a good indication of how well the Russell Sage recommendations work out in practice. Since they are all quite similar in methods, an analysis of Household Finance Corporation, which is one of the largest and one of the most aggressive in sales promotion, and has been the object of more public discussion, will give a good picture of the whole situation.

Household is capitalized at \$30,000,000. It has offices in fifteen states, all of which have a Small Loan Law. It is frankly in business to make money, and does all in its power to



"On our cooking program tonight we have an old favorite."

EXHIBIT D 5 (h) (450 a)

(Continued from page 50)

show a profit at the end of the year. It maintains a large suite of offices at central headquarters, and its executives are well paid. Its employees are well treated, slightly better perhaps than with most large corporations. It has both been bitterly attacked as an outrageous usurer, and highly praised as a great social benefit.

Household says it is in the business of retailing credit. Its preferred stockholders receive 8% dividends; it borrows money from banks at going rates. Its average cost of money is about 7%. Its average loan is for \$100, and its average interest rate is about 34% per year; the average rate collected is 29% of assets used. It therefore retails its credit at about four times what it pays for it. This difference is accounted for as the cost of "retailing" money in "broken lots."

Expressed in actual figures, it costs Household \$7 for the use of \$100 for one year, but the customers jointly pay \$29 for the use of the same money, a gross profit of \$22, five-sixths of which is absorbed by operating expense. However, the individual customer who repays a \$100 loan in twelve monthly installments pays charges totaling, not \$34, but \$19.50.

UNDER THE TERMS of the Small Loan Act there is no minimum rate which can be charged. The reason Household loans for an average somewhat below the legal maximum is that there are other companies in the field competing for customers. In many ways the retailing of credit is comparable to the retailing of any other commodity.

To borrow from Household one must satisfy the branch manager that the loan can and will be repaid. He will want to know why you need the money, how much you earn, what kind of a record you have, whether you are going to keep your job, and many other details. He will scrutinize your budget, and see how much you will be able to repay each month. He is not afraid of you if you are delinquent to your merchants and other local creditors, and borrowing to pay bills; in fact, nearly 80% of the loans are for that purpose. Many of them are to meet emergencies, but just as many are to clear up indebtedness that has accumulated because of unforeseen difficulties or even carelessness.

Household is very much interested in making money, and has a long range sales promotion policy. It realizes that all small loan companies are more or less suspect, and is making strenuous efforts to overcome such suspicions. It tries to build customer good will, and does so by helping borrowers balance their budgets as easily as pos-

Difference Between Various Types Lending Agencies Revealed By Administrative Costs

AN ADDRESS by Dr. M. R. Neifeld, statistician of the Beneficial Management Corporation, entitled "The Anatomy of the Interest Rate," has been made available to the readers of PERSONAL FINANCE NEWS through the courtesy of The University of Chicago Press.* Taking as the basis of his discussion a few quotations from an address by Dr. Edwin W. Kammerer, entitled "Trends in Interest Rates," Dr. Neifeld proceeds to dissect the interest rate as follows:

It is in the administrative expenses that the great differences between various types of lending agencies appear. Regardless of differences in the structure of credit institutions there are 10 factors which govern the expenses of administration and, therefore, the interest rate. I have jotted down these factors without any attempt to line them up logically or to make them consistent.

These 10 factors are:

- (1) Financial pyramid.
- (2) Cost of funds.
- (3) Possibility of shifting expenses.
- (4) Taxation.
- (5) Wholesale and retail type of business.
- (6) Selection of size of loan.
- (7) Allowance for shrinkage.
- (8) Allowance for profit.
- (9) Cost of educating government.
- (10) Programming the borrower.

These 10 factors of administrative expense that enter into the interest cost of consumer credit will be discussed briefly.

1. The Financial Pyramid

The first of the 10 administrative cost factors that enter into an interest rate is the question of the financial pyramid of the lending institution. Some credit institutions are so constructed that they use only their own capital in their own operations. Other credit institutions are

able to use in addition to their own capital supplementary funds which increase their working capital.

In addition to its own capital, surplus and undivided profit, a commercial bank uses as working capital the deposits of its depositors. The usual ratio for a sound bank is to have eight times as much in deposits as it has of its own capital. For some banks this ratio of deposits to capital will be as high as fifteen or twenty or it may be as low as three or four. However, a well run bank will keep the ratio of deposits within eight to ten times its own capital.

Industrial banks of the Morris Plan type will usually have deposits or certificates of investment equal to two or three times their own capital. Morris Plan banks have tried to build this ratio up to four to six. Sales finance companies through bank lines and commercial notes will have a working fund of three or more times their invested capital.

Other institutions, like the credit union, use only the limited deposits and share investments of their members. Personal finance companies are restricted to the use of their own capital with a modest amount of temporary expansion possible through bank loans.

The larger the working fund is in relation to the invested capital of the institution, the lower the interest rate can be and still yield a satisfactory return for the entrepreneurial risks of those who have contributed their capital to the enterprise.

2. The Cost of Funds

The second item of administrative costs that enter into an interest rate is the cost of funds used by the institution. In the past commercial banks have paid as much as 2 per cent on demand deposits but at the moment the banks pay no interest on demand deposits. Hence, the bank that has a ratio of eight to one of deposits to capital will have no cost

on eight-ninths of the fund it uses. The cost on the invested capital funds used will be the dividends that are finally declared.

Similarly, industrial banks of the Morris Plan type formerly paid up to as high as 4½ per cent to attract investors to their certificates. This rate is now down to 2½ per cent.

The co-operatives of the credit union type have no cost for the use of funds except what is repaid in the way of dividends.

A number of the remedial loan organizations of the type of the Provident Loan Society of New York have had use of limited dividend funds which were subscribed to them by wealthy men.

Personal finance companies have hitherto had to attract their capital by offering above-the-market rates. Their business was new, not well understood nor fully accepted by the community. At best investment funds could be attracted only by better than average rates. Only within the last 10 years has the investment banker recognized the development of the personal finance companies and been willing to raise funds for them by underwriting.

Thus the cost of investment funds is an element which enters into the determination of the final rate which a credit institution must charge.

3. Possibility of Shifting Expenses

The third element of administrative cost that enters into the determination of an interest rate is the possibility of shifting in some way part of the administrative expense back on to the person or individual who applies for accommodation. For example, a commercial bank makes a loan to a depositor on the basis of a certified public accountant's statement. This statement has been paid for by the borrower. This shifts the cost of investigation of the financial responsibility of the applicant for a loan back on to

* "Financing the Consumer," University of Chicago Press, University of Chicago, Chicago, Ill., 114 pp., paper cover, \$1.

the applicant. Thus this cost of investigation does not have to be provided in the rate of interest charged by the bank.

The personal finance company has to go out and spend the money to make an equivalent examination of the stability, character and position of the applicant for a loan. This means that the cost of this investigation is borne by the lending institution and must be provided for in the rate charged.

Some of those who spoke this morning mentioned an arrangement under which a public utility makes the collections on the sale of an ice box or other piece of electrical equipment sold to consumers in its district. This is another example of the shifting of costs. In this case the collection costs rather than the investigation costs are shifted. The costs of operation are, therefore, reduced and a lower rate is possible.

In the credit unions there is perhaps the ultimate amount of shifting of costs. In these organizations the paid employees are at a minimum and members of the organization contribute their time and effort. Most of the work is done on a free basis and in most cases there is donation of quarters by the host institution. In some instances too, there are pay roll arrangements similar to the labor union check off system which permit collections with a minimum of difficulty.

Depending upon the possibility of shifting some of the items of acquisition or of administrative expenses, greater or lesser allowance must be made correspondingly in the interest rate.

4. Taxation

The fourth element of administrative expense that enters into the determination of an interest rate, is taxation. Institutions vary all the way from the exemptions that the credit unions enjoy to the heavy taxation that state income laws, federal income laws and surplus profit law's impose. The rate of interest charged by each institution must make or include some provision for the payment of federal, state and local taxes.

5. Wholesale, Retail Type Business

The fifth item that determines administrative costs which must be provided for in the rate of interest, is the question of whether the credit institution is en-

gaged in a wholesale or retail finance business.

Take the commercial bank as such and consider its average loan. You may consider the commercial bank as engaged in wholesale credit as against the credit union; the personal finance company or other consumer credit institutions that make loans in such small amounts that they in turn may be considered as in the business of retail credit.

An ordinary commercial bank may have an average loan of \$10,000. The consumer credit agencies that deal with the wage earners are more apt to have average loans of \$100. Because the retail cash credit agencies are operated on the principle of installment repayment of loans, the amount of bookkeeping is much larger than the 100 to 1 ratio of the relative size of loans.

The wide differences in the amount of detail routine handling of loans makes a correspondingly wide difference in administrative costs which must be absorbed in the final rate of interest.

6. Selection of Size of Loan

Number six in the overhead cost elements that enter into an interest rate is the selectivity of size of loan for a given institution.

We have just seen that there is selectivity of a portion from the whole credit area by the different institutions. Some deal in wholesale quantities of credit; some furnish credit in retail amounts. Similarly, there is a possibility of selectivity of size of loan within the area for a given type of institution. For a given area it is possible for an institution to cover the whole range or to limit itself to a portion of that range. For instance the typical loans by the big city banks may average \$500,000, while those made by small town banks may average \$5,000. Within the field of commercial banking there is selectivity of size.

The Provident Loan Society of New York has an average loan of \$49 whereas the ordinary pawnshop's average pledge runs from \$10 to \$15. Here is another illustration of selectivity.

Among the institutions which confine themselves to making loans up to a maximum of \$300, such as personal finance companies, it is possible to make all loans from \$10 to \$300 or to select loans in the upper brackets of this range.

The personal finance companies have done considerable cost accounting and they find the lower bracket loans are unprofitable. The breaking point between profit and loss in these institutions comes somewhere between \$75 and \$100. Operating costs for institutions of this kind can, therefore, be reduced somewhat if they confine themselves to the upper bracket loans. The only qualification that might be made is that the principle of differential costs permits an institution, that formerly had confined itself to upper bracket loans, to reach down for some of the lower hitherto unprofitable loans. A lower overall expense ratio may then make it profitable to handle what in itself would be unprofitable.

Within a given area of credit the decision to serve completely or to be selective as to size is an administrative one. The decision to serve all brackets of the field of credit covered by a given institution will lead to one type of operating expense ratio. The decision to serve a more selected portion of that area will lead to a lower ratio. In either case the final rate of interest must include in the provision for the administrative expenses of a particular business the differential factor of selectivity.

7. Allowance for Shrinkage

The seventh element of administrative costs that must be included in an interest rate is the provision for losses.

It is common practice in all types of business to set aside part of the earnings to build up reserves against loss of principal.

The accounting practice of credit institutions provides reserves against loss of principal so that the lender's funds may remain unimpaired.

In addition to provision against loss of principal, lending institutions must provide against loss of income due to shrinkage. The legal rate of interest on the outstandings of personal finance companies in the State of Illinois in 1935 was for all practical purposes $3\frac{1}{2}$ per cent. The going rate actually charged under competitive conditions was 3.07 per cent. The realized rate experienced in practice was 2.83 per cent. The difference between the going rate and the realized rate was shrinkage due to interest not collected, and interest waived

(2)

EXHIBIT D 5 (1) (453a)

in making settlements with delinquent borrowers.

Every interest rate, then, must include in its makeup an allowance for loss of income due to shrinkage and loss of interest due to bad debt losses.

8. Allowance for Profit

Profit is the eighth element in our analysis for which allowance must be made in the final rate of interest.

Profit is, if you like, the compensation or allowance made for managerial ability. Under our capitalistic system profit is the motivating force for economic activity. A man will not risk his time, his energies, or his capital unless there is a reasonable hope of profit.

Managerial ability is rare. Statistics of business failures and the income tax reports of profitless corporations testify to that fact.

Any finally computed rate of interest to be charged by a given credit institution must include provision for profit.

9. Cost of Educating Government

Since listening to Senator Ingram* last night, I have added a ninth component of an interest rate. This ninth component of an interest rate is the cost of educating government.

In an eloquent statement Senator Ingram held that regulation by government authorities was important for credit institutions, especially consumer credit institutions. We are all inclined to agree with him. These institutions are affected with a broad public interest.

Senator Ingram suggested that it was the duty of the business man to make the administrator in charge of regulated credit institutions acquainted fully, intimately and sympathetically with each type of institution. Only by close co-operation can there be intelligent understanding of the function of each type of credit institution and wise administration of regulations.

*The Hon. G. Erie Ingram, Wisconsin State Banking Department, Madison, Wisconsin.

In these days of rapid drift to more and more active regulation by governmental bodies, there will be increased necessity for close co-operation between the business man and the administrator. This co-operation costs money. It becomes an inescapable part of the administrative overhead cost of the institution. As such this cost ultimately appears as a component in the final statement of an interest rate.

10. Programming the Borrower

The tenth item of cost in the determination of an interest rate is the cost of what might be called programming or budgeting or servicing the individual borrower.

This item of programming is of minor importance in some institutions but of major importance with others. The commercial bank applies certain standards of performance to the balance sheet brought in by the business man who is a prospect for accommodation. The commercial bank has found when certain ratios obtain between different items of the balance sheet the business is being satisfactorily run. The average business man is acquainted with these standards and attempts to keep his operations in such shape that he will always be qualified for bank credit. In the case of the business man the effort to comply with what he knows are the standards of the bank is made on his own initiative and at his own expense before he applies for a loan.

When it comes to individuals, the situation is somewhat different. No such hard and fast ratios can be worked out to apply to individual family situations as in the case of commercial banks and the business man's balance sheet. However, consumer cash credit institutions make loans only for what they consider worth while purposes. The credit unions in their charters include the provision that loans can be made only "for provident and constructive purposes."

The personal finance companies have necessarily to do at their own expense a great deal of budgeting to rearrange the fiscal affairs of families so that a program can be set up to permit repayment of indebtedness out of the surplus of income over outgo. This budgeting advice has a high social value.

The cost of this budgeting on a realistic basis is a more important item of administrative overhead for personal finance institutions than for most other institutions. The cost of budgeting is an item that must be reflected in the final rate of interest.

The 10 items of costs outlined above will fall into or be included in the administrative costs of conducting any credit institution. Some of them will fall more heavily on the consumer credit institutions than on commercial banks. Each one of the 10 items of administrative expense contributes its share to the final rate of charge characteristic of the institution. That final rate is low or high according to the importance or insignificance of the contribution made to the final computations by each of these 10 items.

In another method of classification the costs of operating credit institutions can be grouped into three kinds: (1) costs that are inherent in the structure of the institution, (2) costs that are inherent in the character of the service rendered or performed by the institution, and (3) costs that are common to all.

These items condition the cost of service whether it is retail or wholesale handling of credit as in a commercial bank.

Some of these items are subject to control and some are not. They are fixed or determined by the structure of the institution and the character of the service.

Since some of these items are subject to control and some are not, there is raised the question of the possibility of curbing the cost in any or all institutions.

**"Why are the rates
at small loan companies
more than 6%?"**

A REPRINT
of an
INSTITUTIONAL ADVERTISEMENT
DECEMBER, 1938

EXHIBIT D 5 (J)

(455a)

“Why are the rates at small loan companies more than 6%?”

“When my little boy was hurt I had to get a loan of \$100 to meet the extra expense,” one man was saying to another. “I didn’t want to ask my friends to advance me the money or sign my note and I had no collateral for a bank loan. I hardly knew where to turn. Then I remembered having read that a regularly employed person could borrow from Household Finance on his own signature and went to their nearby office.”

“They loaned you the money?” asked the other man.

“Yes, I got it without delay or red tape. Now I’m repaying my loan in small monthly installments.”

That sounds like a fine thing for people who need money for emergencies.”

“It certainly is. But tell me, why are rates at small loan companies more than 6%?”

In the minds of many people 6% or thereabouts represents a proper charge for the use of money. True, such a charge is a very common one in commercial loan transactions. But small loans made by family finance companies have little or nothing in common with commercial loans.

Charges can’t be compared

Commercial loans are largely wholesale transactions—from several hundred to several million dollars each. The family finance companies, in contrast, rarely lend over \$300 at one time. Many of their loans may be for as little as \$50. Their loans are all retail transactions.

A bank or mortgage company may often lend say \$10,000 in one commercial transaction. To lend \$10,000 the family finance company may make as many as 100 loans to as many different borrowers. Naturally it costs the family finance company far more to serve its 100 borrowers than it does the institution lending \$10,000 in one transaction.

Family finance company has far higher operating costs

Let’s assume, for the purpose of illustration, that the overhead cost of making a loan is the same for a bank serv-

ing commercial borrowers and for a family finance company, say \$15.00. To make its one loan of \$10,000 the bank would thus have a cost of \$15.00. But in making its 100 loans of \$100 each the family finance company would have a cost of \$1500!

It is pertinent to note that banks making personal loans find themselves obliged to charge far higher rates on these loans than on commercial loans—usually two to four times as much. On personal loans most banks require co-signers. Two, sometimes three, individuals sign the borrower’s note. If the borrower fails to repay, the co-signers become responsible for repayment of the loan.

The family finance company must depend on its own efforts to obtain repayment from delinquent borrowers. When unavoidable circumstances prevent a borrower from repaying his loan the family finance company takes the loss. Thus collection costs and bad debt losses also contribute to the operating expenses of the family finance company.

If the family finance company charges higher rates than those charged on various other types of loans it is for the simple reason that its costs of operation make higher rates unavoidable. This fact has long been recognized by the drafters of the state small loans laws. These laws—everywhere accepted by impartial students of consumer credit problems as laws which serve and protect the borrower—authorize maximum rates which will cover the costs of doing business and make possible a return to capital sufficient to encourage the establishment of small loan companies.

Household Finance rates below lawful maximum

For many years it has been Household Finance’s aim to lend at the lowest possible charge consistent with sound business policy. By efficient management Household has been able to lower its rates on repeated occasions. Today Household Finance gives borrowers the benefit of lower rates than the lawful maximum in almost every state in which the company operates.

HOUSEHOLD FINANCE

CORPORATION . . . “Doctor of Family Finances”

... one of America’s leading family finance organizations, with 235 branches in 152 cities
Headquarters: 919 North Michigan Avenue, Chicago, Illinois
1878 ★ ★ Completing Sixty Years of Service to the American Family ★ ★ 1938

EXHIBIT D 5 (J)

(456a)

amphlet circulated
by HFL

1948

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FINANCING THE AMERICAN FAMILY

EXHIBIT D 5 (k) (457 a)

FINANCING THE AMERICAN FAMILY



HOUSEHOLD FINANCE CORPORATION

Established 1878

EXHIBIT D 5 (k) (458 a)

Economic Changes Have Made Consumer Finance Necessary

Overcoming modern economic difficulties requires as much courage and enterprise by American families as was displayed by men and women of covered wagon days.

At that time money was not a necessity. The oldtimer produced most of the things his family consumed or traded part of his produce for such things as cloth, hardware, and household furnishings. Today it is a different story. In most cases families depend upon a pay check for all the necessities of life.

There is an ever-present need for money. When debts pile up because of sickness or other temporary unemployment, rising prices, or occasional mismanagement, or when cash is required to meet the emergencies of birth, death, or travel, to take advantage of opportunities in education or business, or to purchase modern conveniences, the head of the family must have cash. Where can a self-respecting employed individual turn for aid? Not to nature, as did the pioneer! It is a question of beg, borrow, steal or go without.

MODERN CONSUMER FINANCE IS THE ANSWER A DEVELOPMENT OF THE LAST THIRTY YEARS

For many years the retail nature of the business of making small loans to be repaid in monthly installments was ignored. Until 1911 legislatures assumed that such loans could be handled at the low rates provided in state usury laws. The result of this



The pioneer family built its own home out of materials bountifully provided by nature.

mistake was that about 80 per cent of American families were left without loan facilities for meeting emergencies and refinancing debts. Beginning with Massachusetts in 1911, however, one state after another enacted consumer loan laws permitting commercial capital to engage in the business of making small cash loans at rates high enough to attract capital into the business. In return for a license to operate, these lenders are subject to state supervision and regulation.

Today 32 states and Canada have adopted consumer credit legislation based on the Uniform Small Loan Law. About 87



*The average city family of to-
day rents the home it occupies.*

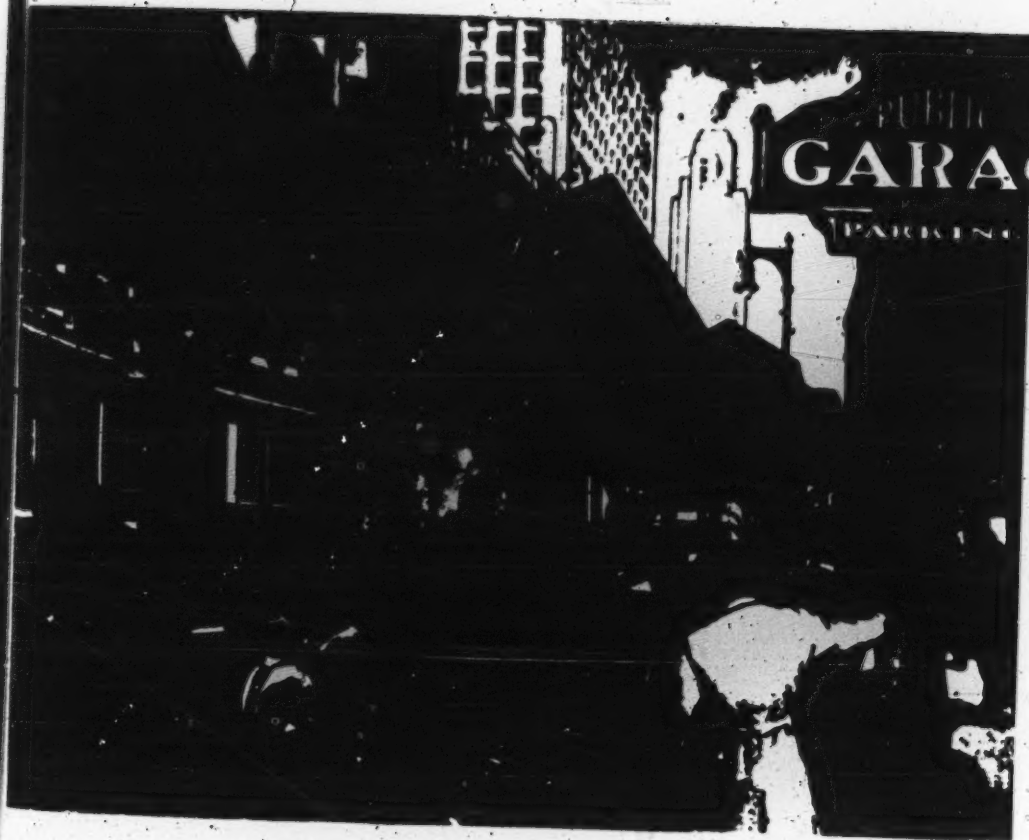
per cent of the urban population now enjoys the benefits of such laws. These laws have been advocated by the leading civic and social service organizations. They have been endorsed and signed by such outstanding governors as Franklin Roosevelt, when Governor of New York—Frank Lowden of Illinois—James Cox of Ohio—Calvin Coolidge of Massachusetts—John W. Bricker of Ohio—Paul V. McNutt of Indiana—Harold E. Stassen of Minnesota—and Woodrow Wilson, when Governor of New Jersey. The consumer finance business also has the endorsement of the banking commissioners or other supervising



*In olden days families got free transportation
by hitching their plow horses to a wagon.*

officials in the 32 states which have small loan laws. Under their supervision there are now over 5,000 state-licensed consumer finance offices.

Besides consumer finance companies there are other lending institutions serving the demand for consumer loans. Chief among them are banks, credit unions, and industrial loan companies. The loan requirements and rates of charge of these other agencies vary, based on differences in the size and type of loans made, cost of servicing, and risks involved.

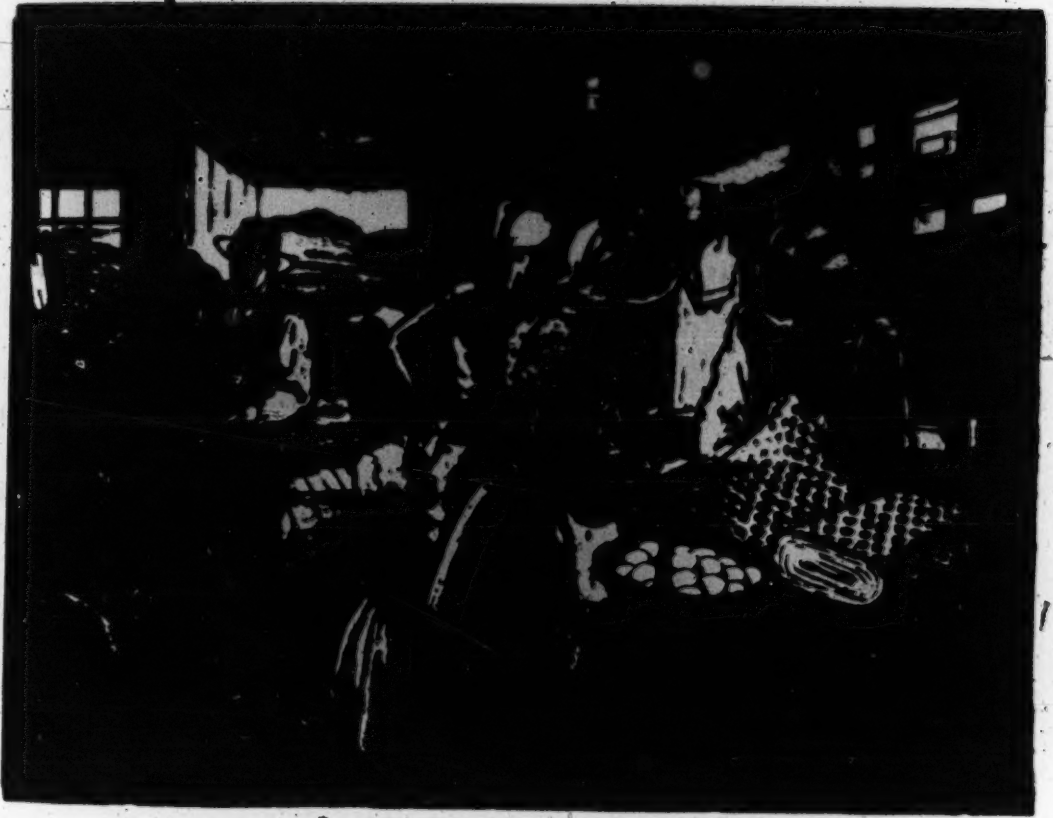


*Today a score of speedier, more convenient systems
are at families' commands—but each exacts a fee.*

HOUSEHOLD FINANCE CORPORATION

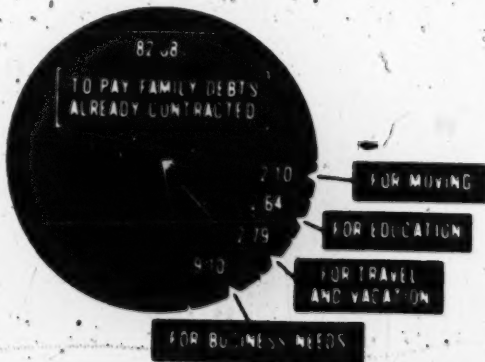
One of the leading consumer finance companies is Household Finance Corporation, established in 1878 and now operating in 270 cities of the United States and Canada. Household Finance has over 400 offices in these cities, conveniently located, enabling it to serve the demand of these communities. During a recent twelve-month period, Household Finance made 1,153,818 consumer loans to families and individuals, helping them to help themselves. Every profession and trade listed in the U. S. Census is served.

EXHIBIT D 5 (k) (463 a)



In olden days money was unnecessary. The produce families raised could be traded for everything from gingham to gun powder.

Why do people borrow money? Household Finance loans are made primarily for the purpose of helping families get out of



debt. 82.68 per cent borrowed to pay family debts already contracted. However, the modern family often needs cash to obtain an education or buy tools or to embrace some great opportunity. 9.1 per cent of the families borrowed for needs in connection with making a living, 2.79 per cent for



*Today money is the first essential. Only with it
can food, clothing, shelter, recreation be secured.*

travel and vacation, 2.64 per cent for education, 2.1 per cent for
moving and miscellaneous expenses.

It costs more relatively to retail small sums of money than to
lend large amounts, for the same reason that apples are sold
more dearly by the pound than by the carload. The costs of in-
vestigating, making, and collecting are approximately the same
for loans of different sizes. These fixed costs per loan are a
larger per cent of small sums than of large sums. For example,
one lender may have loan balances averaging \$100 throughout
the year owed to him by borrowers. A charge of 20 per cent



*So in olden days families produced everything they needed
and depended only on themselves for the necessities of life.*

a year would thus be necessary to cover fixed costs of \$20. But another lender, whose balances averaged \$400, would have to charge only 5 per cent a year to cover the same \$20 fixed costs.

Household Finance gives borrowers the advantage of the lowest possible charges consistent with sound business practice. In spite of its size it is a very human organization. Everything is geared to the convenience and satisfaction of the individual borrower. Its experience in serving many people over many years has sharpened its appreciation for the use of courtesy and patience in tailoring each loan transaction to the necessities of



But today families produce only a fraction of their needs... depend on pay envelopes to buy the rest:

the applicant. If emergencies arise, extensions are granted. If conditions improve, the borrower may increase his monthly payment or pay the entire loan at once, thus saving charges.

An outstanding feature of Household Finance's lending operation is the speed with which borrowers repay their loans and get off the books. Every month approximately 4.60 per cent of the total number of accounts terminate their borrowing. This means that the average length of continuous customer indebtedness, including those who renew their loans or obtain additional cash, is 21.69 months.

Loans to Pay Overdue Bills Benefit Debtor, Merchants and the Consuming Public

When a debtor borrows to pay overdue bills, he consolidates numerous small debts into a single obligation which he can then discharge systematically in small periodic instalments within his power to save. It would seldom be practical for him to distribute such small payments proportionately to many creditors. The consolidating loan benefits the debtor by providing an amortizing plan for working out of debt.

In a recent year Household Finance lent to 1,153,818 borrowers a total of \$229,048,758. The average loan was \$199. These loans were made mostly for paying overdue bills and also for meeting emergencies beyond current income or cash resources.

The average monthly income of these borrowers was \$219. Their indebtedness was about equal to a month's income. Pressure from creditors was in many cases becoming embarrassing. With such bills due in a lump, they were unable to pay enough on them to make much headway in liquidation or to satisfy their creditors. In borrowing from Household collection pressure is released, creditors are satisfied, and time is provided for amortization of the debt on a regular schedule. The borrowers' average monthly payment of principal and interest required by the loan contracts to liquidate these average loans of \$199 was \$14.74.

In other words, income remained at an average of \$219, obligations were cut to \$14.74 per month, and the difference, an average of \$204 per borrower per month, was left to buy goods and services. A sound consumer loan transaction follows these principles:

1. Total obligations of the debtor must not exceed a sum which can be paid within a reasonable period.
2. Repayment schedule of the loan must be tailored to the debtor's paying capacity.
3. In collecting the loan, the lender must maintain continuous knowledge of the debtor's changing financial status, making necessary extensions, and bringing to bear the necessary pressure to curb natural extravagance.

Under such conditions, consumer credit is remedial for borrowers.

SAVINGS FOR CREDITORS

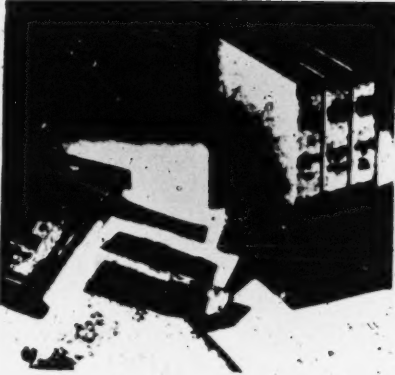
Payment of bills obviously helps to maintain the solvency of creditors. It enables them to gain turnover on use of capital and to take their wholesale discounts. It reduces the cost of merchandising, thus improving the merchant's competitive position. It eliminates loss of trade due to the fact that families who owe a debt to a merchant usually trade elsewhere. This takes no account of the loss of trade to all merchants because the insistence of payment in full absorbs so much of the debtor's income that only with difficulty can bare subsistence living standards be main-

tained. When a family pays off its loan over a more reasonable period, family morale and health are preserved, purchasing power is stabilized, and good will maintained.

BENEFITS FOR THE CONSUMING PUBLIC

Because economies lead to price reductions, the consuming public should be interested in cutting the retailer's costs incident to carrying and collecting slow accounts. Such costs include book-keeping charges, making out and mailing bills, and collection costs. Bad debt losses originate in delinquent accounts. To maintain the level of his working capital, the creditor must borrow additional funds for which he must pay interest.

Merchandising and banking are two distinct businesses. Those who require extended credit (refinancing) should be expected and required to pay for it and not put the merchant in a free banking business, the cost of which, plus the cost of the resulting bankruptcies and insolvencies, must be added to the selling prices of goods and services to be borne by all customers.



Household's Consumer Education Work

According to PRINTERS' INK, "no other business organization has participated so actively and effectively in the consumer movement as Household Finance Corporation. . . . During a period of 12 years Household has issued 39 booklets on Money Management of family income and Better Buymanship of goods and services. Total distribution to date exceeds 9,000,000 copies. The booklets have been used as texts in thousands of school-room classes and in adult consumer education groups. They are circulated in public libraries throughout the United States and Canada."

This program was developed primarily to serve the families who bring their financial problems to us each year. We lend our money to these families. Naturally we are interested in their efficiency as "going concerns."

Household Finance Corporation believes that business promotes its own progress and stability by equipping consumers with information which will make them wiser money-managers and better buyers.

The Budgeteer Club was set up as it became more and more evident that many families, not necessarily those in financial straits, needed an adviser in working out money management programs. The four-years' registration list of this club shows that over 10,000 families and individuals have taken advantage of the service. Members of this group use a Budget Calendar. The scores of problems they put up to the adviser, and the number of friendly letters they write indicate a keen interest in and an appreciation for this confidential service.

*An order list of Consumer Education materials
will be sent on request.*

Branches of

HOUSEHOLD FINANCE CORPORATION and Subsidiaries

Arizona Phoenix	Des Moines Dubuque Iowa City Mason City Ottumwa Sioux City Waterloo	New Hampshire Concord Manchester Nashua	Hazleton Johnstown Lancaster Lebanon McKeesport New Castle Norristown Oil City Philadelphia Pittsburgh Pottsville Reading Scranton Upper Darby Wilkes-Barre Wilkes-Barre York	CANADA Alberta Calgary Edmonton British Columbia New Westminster Vancouver Victoria Manitoba Winnipeg New Brunswick Fredericton Saint John Nova Scotia Halifax New Glasgow Truro Sydney Ontario Belleville Brantford Chatham Cornwall Ft. William Galt Guelph Hamilton Kingston Kirkland Lake Kitchener London New Toronto Niagara Falls North Bay Oshawa Ottawa Peterborough Port Arthur St. Catharines St. Thomas Sarnia Sault Ste. Marie Stratford Sudbury Timmins Toronto Welland Windsor Woodstock
California Alhambra Berkeley Fresno Glendale Huntington Park Long Beach Los Angeles North Hollywood Oakland Pasadena Sacramento San Bernardino San Diego San Francisco San Jose Santa Monica Stockton	Kentucky Louisville Maryland Baltimore Cumberland Hagerstown Mt. Rainier Silver Spring Massachusetts Boston Brockton Brookline Cambridge Fall River Fitchburg Lowell Lynn Malden Medford New Bedford Quincy Salem Somerville Springfield Waltham Worcester	New Jersey Camden Elizabeth Hackensack Jersey City Newark Orange Passaic Paterson Perth Amboy Trenton Union City New York Albany Bay Shore Binghamton Buffalo Hempstead Lockport Middletown New York Niagara Falls Rochester Syracuse Troy Utica Yonkers	Rhode Island Providence Utah Salt Lake City Virginia Alexandria Lynchburg Richmond Roanoke Washington Seattle Spokane Tacoma West Virginia Charleston Clarksburg Fairmont Huntington Morgantown Parkersburg Wheeling Wisconsin Appleton Beaver Dam Beloit Eau Claire Fond du Lac Green Bay Janesville Kenosha La Crosse Lake Geneva Madison Manitowoc Marinette Marshfield Milwaukee Oshkosh Portage Racine Sheboygan Stevens Point Superior Watertown Wausau Winconsin Rapids	Quebec Chicoutimi Drummondville Hull Montreal Quebec City Rouyn Shawinigan Falls Sherbrooke Three Rivers Val d'Or Verdun Saskatchewan Regina Saskatoon
Colorado Denver	Michigan Ann Arbor Battle Creek Bay City Dearborn Detroit Ferndale Flint Grand Rapids Highland Park Iron Mountain Jackson Kalamazoo Lansing Muskegon Port Huron Saginaw	Ohio Akron Canton Cincinnati Cleveland Columbus Dayton East Liverpool Elyria Hamilton Lima Lorain Mansfield Massillon Middletown Portsmouth Springfield Steubenville Toledo Warren Youngstown Zanesville		
Connecticut Bridgeport Hartford New Britain New Haven Norwich Stamford Waterbury		Oregon Portland Pennsylvania Allentown Altoona Beaver Falls Bethlehem Bradock Chester Easton Erie Harrisburg		
Illinois Alton Aurora Bloomington Champaign Chicago Cicero Decatur East St. Louis Freeport Galesburg Joliet Moline Oak Park Peoria Rockford Springfield Waukegan				
Indiana Anderson East Chicago Evansville Fort Wayne Gary Hammond Indianapolis Michigan City Muncie South Bend Terre Haute	Minnesota Duluth Hibbing Minneapolis Moorhead St. Paul Virginia Missouri Kansas City St. Joseph St. Louis Nebraska Lincoln Omaha			
Iowa Cedar Rapids Council Bluffs Davenport				

HOUSEHOLD FINANCE

Corporation

ESTABLISHED 1878

General Headquarters:

919 North Michigan Avenue, Chicago 11, Illinois

Established in 1878 • Incorporated in Delaware in 1925

Sub-Headquarters

1616 Walnut Street, Philadelphia 3

215 West Sixth Street, Los Angeles 14

Executive Office of

Household Finance Corporation of Canada

80 Richmond St., West, Toronto

Household Finance Corporation is publicly owned. The funds employed in the business are obtained from people and institutions who either lend capital to it or invest capital in it. The borrowed capital is in the form of short term bank loans or long term debentures. The invested capital is in the form of preferred and common stocks. The debentures and the stocks are listed on the New York Stock Exchange. This statement is not intended to influence the purchase or the sale of the Corporation's securities.

Trustees for Debentures:

New York	J. P. Morgan & Co. Incorporated
Chicago	The First National Bank of Chicago

Transfer Agents for Preferred and Common Stocks:

New York	J. P. Morgan & Co. Incorporated
Chicago	The First National Bank of Chicago

Registrar for Preferred and Common Stocks:

New York	Bankers Trust Company
Chicago	Continental Illinois National Bank and Trust Company of Chicago



JULY 1950

P. 4

Changing Times

THE KIPLINGER MAGAZINE



The small-loan business, good and bad

How to check up on a labor union

Them as earns gifts

Does your mind make you sick?

Things to write for The months ahead

EXHIBIT D 5 (1) (474a)

D

THE SMALL-LOAN BUSINESS, GOOD & BAD

It may be all right to borrow, but learn the ropes first

ONE out of every five American families is going to borrow some money from a small-loan company this year. By the year's end those 9 million or so families will have borrowed a total of more than a billion and a half dollars.

That's a lot of people and a lot of money. Small loans are big business. They are also common, everyday transactions.

Perhaps you have never borrowed from a small-loan company, and perhaps you never will. You can certainly hope that you never need to, for, as small-loan people themselves will tell you, it is an expensive way to get money. If you must borrow, you will usually pay a lower rate of interest if you can get the loan from a bank or credit union or on life insurance—to say nothing of putting the bite on friends or relatives.

The fact is, however, that a great many people, either by choice or necessity, turn to small-loan companies in an emergency. And yet, despite its size and scope, the small-loan business is one that is little understood and much misunderstood.

Why are interest rates so high? "Are the lenders all gyps? Is 'money on your signature' just a gag? How do you get a loan? What happens if you can't pay it off? And how heavy are the losses?

Those are just a few of the questions that people ask time and again. They often get the wrong answers.

Here are the right ones:

Licensed Loan Companies

THERE are those who refer to all small-loan lenders as loan sharks, who think of the two terms as interchangeable. Actually, there is all the difference in the world between them.

Let's look first at the licensed small-loan companies. They operate almost entirely in the 33 states that have an effective or partially effective version of something known as the Uniform Small Loan Law. This law authorizes them to charge higher interest rates than other kinds of lenders. Keep that point in mind—more about the figures and reasons later.

The rate of interest these licensed lenders can charge under that law is limited, commonly to 3% a month, though ceilings in different states range from 2% to 3½%. Interest rates must be stated in a certain way and, except in a few states, must cover all charges for the loan.

The state laws limit the amount which they may lend—usually \$300, sometimes \$500, and occasionally more. They are subject to state supervision and annual examinations. There are usually restrictions on advertising. And a host of provisions seal up loopholes and outlaw the various slick tricks that loan sharks use to evade the law or to milk their customers.

There are about 6,000 licensed loan offices in the regulated states. The majority of companies are local outfits, but the bulk of the business is garnered by 20 large chains. Some companies are individually owned, some are partnerships,



Money is
a good servant
but a bad master.
—R. C. Behn

Reprinted from CHANGING TIMES The Kiplinger Magazine, July 1950

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some are corporations. The big ones — like Household Finance Corp., Beneficial Management Corp., American Investment Company of Illinois, Family Finance Corp. — are listed on the New York Stock Exchange.

The figures quoted in the first paragraph of this article—9 million families, a billion and a half dollars—refer only to the licensed companies. That's the amount of business they do. They are "good."

Loan Sharks

NOW how about the other kind of lenders, the loan sharks? Who are they, and how do they work?

They are the sharpies who evade or avoid the law and make small loans at exorbitant interest rates, principally in the 15 states (and the District of Columbia) that have either no small-loan law or an ineffective one. They are unlicensed and usually unscrupulous.

Few of the licensed companies do a small-loan business in these states (though some make appliance and car-purchase loans in one or two of them); so the loan sharks have the field pretty much to themselves. On a rough estimate, they lend about 200 million dollars a year.

Wherever he is, the loan shark is engaged in just one trade—charging, by open violation or through a string of gimmicks, interest rates that not only are higher than the law allows, but are sometimes astronomical. Often the victim of a loan shark doesn't know what interest he is actually paying, but the common range is from 100% to 500% a year, or even more. There is a case on record in which the interest rate figured to 7,300%.

Typical of the open violators are the "5 for 6" boys. They lend you \$5 today, you pay back \$6 next week. Annual interest rate: 1,040%.

A common trick for skirting the law is salary buying. The operator doesn't lend money; he just buys your next week's salary at a discount and hence claims he is not subject to the ordinary interest-rate laws.

Another trick is to buy something, say furniture, for one sum in exchange for your pledge to buy it back at a higher one. Another is to have the borrower sign two notes, one for principal and one for interest, then it is next to impossible to prove that any interest at all is being charged. Some sharks work in teams. A "broker" charges you one sum to arrange the

loan; his crony then charges you a legal rate for the loan itself.

And finally, a favorite practice of loan sharks is to keep a victim in debt. They won't insist on repayment of the loan itself, and they may even prevent repayment by refusing to let the borrower pay off in instalments. They are content to let it run—as long as they can keep collecting the interest.

If that sounds strange, see how it can work out in an extreme case. A Dallas man borrowed \$20 on which he paid interest of \$2.25 a week. Nine years later he had paid \$1,053 in interest and still owed the lender more than he had borrowed.

By this time you may be wondering. If licensed companies lend at much lower rates than loan sharks, if states can control them so closely, why do loan sharks exist? You'll find the answer to that in the story of how the legitimate small-loan business developed.

Small-Loan Laws

THE suspicious-looking element in a small-loan law, something which even today leads some people astray, is the fact that it allows a licensed loan company to charge interest rates higher than those allowed by the ordinary state usury laws.

Usury laws, in the absence of other provisions, place a basic ceiling on interest rates. The maximum allowed is usually between 6% and 12% a year, which amounts to ½% to 1% a month. Those are the legal limits where there are no adequate small-loan laws. Until 1911 they were the legal limits everywhere.

With nothing but usury laws in force, loan sharks thrived and thrive today, for such laws are weak and easily evaded. The obvious remedy — strict enforcement — just doesn't work. That was the first thing tried when research and philanthropic organizations, led by the Russell Sage Foundation of New York, started fighting the loan shark problem at the turn of the century. The attempt failed.

Finally, after an exhaustive four-year study the Russell Sage Foundation found what the two fundamental difficulties were.

First, no lender could make loans readily available on the right terms and in the right amounts, and keep his charges within the usury-law interest rate. If he tried, he went broke.

Second, there was a real demand for small loans. And when people who needed loans

There are
but two ways
of paying debt
—increase of
industry in
raising income,
increase of thrift
in buying it out.
—Thomas Carlyle

Act like a customer.
Don't be afraid to
ask questions.



couldn't get them from legal lenders, they went to the only place they could get them—the loan shark, with his illegal rates. And he could do with his customers just about as he pleased.

By facing these facts, the Russell Sage people found the solution. They drafted a Uniform Small Loan Law and worked for its passage by state legislatures.

This law allowed small loans to be made at a rate of interest higher than the usury-law rates—at that time $3\frac{1}{2}\%$ as compared with the ordinary $\frac{1}{2}\%$ to 1% a month. That ceiling was set because it seemed just high enough to attract honest capital into the business and permit a reasonable profit, but no higher. At the same time the law protected the borrower by subjecting the lender to every necessary kind of restriction and regulation.

In effect, the foundation's law staked out the small-loan field so that there was room in it for only the legitimate businessman. Where the law operates, it eliminates the loan shark by eliminating the need for him.

Massachusetts, in 1911, was the first state to pass a modern small-loan act. Its law was the forerunner of the USLL, which other states have adopted year by year, over the frenzied opposition of loan sharks. Despite the tag of "uniform" there are a great many variations in state laws, chiefly in the rate of interest and the size of loan permitted.

Find your state on the table on page 20 to see whether it has effective laws and what the maximum legal charges are.

Now there are two statements in all of this that have to be sniffed before they're swallowed.

First, is it true that loan sharks take over when too low interest rates keep out licensed lenders?

Yes, beyond question. Every investigation ever made shows it. For instance:

In Texas there is no small-loan law, and the maximum legal interest rate is 10% a year. The Dallas Better Business Bureau once studied 2,554 loans made by 72 loan sharks. The lowest rate charged was 120% , the highest was $1,131\%$, the average was 271% .

In Kansas there also is no small-loan law, and the maximum legal rate is also 10% a year. An American Bar Association group found that Kansans borrow about 3 million dollars a year from loan sharks and pay them \$7,200,000 a year in interest.

The second question is, is it true that a small-loan business can't operate profitably at lower rates of interest? Yes, on the weight of the evidence.

In the state of Missouri, for instance, a new constitution recently voided the small-loan laws. Licensed companies stayed and tried to do business at 8% a year. Now practically all have closed down. Early this year Household Finance reported to its stockholders a three-year loss of \$300,000 there and began closing its Missouri offices.

The break-even point varies with company, area, and size of loan—for example, a lower rate suffices in populous industrial states, like Massachusetts and Ohio, than in rural or thinly popu-

lated areas. But on an industry-wide average it falls at about 2%, a month on unpaid balances. Licensed companies don't ordinarily operate in states that won't allow at least that much.

New Jersey once tried cutting its small-loan rate down to 1½% a month. Legal lending dried up, and loan sharks moved in. After two years the legislature moved it up to 2½%, and licensed companies gradually took over again.

Q & A on Licensed Lenders

How much will a loan cost me? For a rough interest range, consult the table of state laws. But there are several things to remember.

First you can often get a loan for less than the maximum rate. Small-loan charges have been coming down slowly but steadily, even in recent high-cost years.

Second, the rates cited are "true interest rates" on unpaid balances, and loans are repaid in installments. Every month, the amount on which interest is being charged gets smaller. Thus you don't pay \$36 to borrow \$100 for a year at 3% a month. You pay \$19.50. The first month you pay \$3 in interest, and the rest of your payment reduces the principal of the loan. By the last month the amount of principal outstanding is so small that your interest amounts to only a few cents.

At 2½% a twelve-months loan of \$100 costs \$16.25, of \$200 costs \$32.50, and of \$300 costs \$48.75. (All of these cost figures are a trifle higher when repayment is on the "level-payment" plan.)

Why do small loans cost so much? Chiefly because they are small. The small-loan company is a retailer. Its price per dollar is higher for the same reason that a coal dealer's price per pound is higher on a sack of coal than it is on a carload lot.

It costs as much to make a little loan as it does to make a big one; but the big loan pays off much more.

If you had \$100,000 and lent it to a business firm for a year at 4%, you would collect \$4,000. If your expenses were \$1,000, you would show a \$3,000 profit. Suppose you took the same amount and made a thousand \$100 loans. With expenses of only \$25 on each loan, you would have to collect \$25,000 in interest just to break even.

A secondary reason for the high rates is the risk involved. Not that losses are heavy; they

aren't. Though greater than for other kinds of loans, net small-loan losses country-wide run only about 1% of the total lent. On the average, roughly a nickel out of every interest dollar you pay a loan company goes to cover bad debts.

However, the risk means that companies must spend money to prevent losses. The man-hours and supplies expended on investigations, interviews, budgeting assistance, collections and paper work all add to the cost.

How, then, can credit unions and banks make small loans at cheaper rates? Credit unions are nonprofit, tax-exempt cooperatives that lend only to members, and hence can lend at a usual rate of 1% a month. Most banks are choosier about borrowers and, most important, the average size of their loans is about twice the loan companies' average. Thus personal loan departments of banks can usually lend at rates of from 6% to 18% a year.

For the most part, the three institutions are serving different groups of borrowers.

What is the usual amount of money borrowed from a small-loan company? Generally speaking, they lend any amount from \$10 up to the maximum permitted by state law. About one third of all loans are for \$100 or less. The nation-wide average is between \$180 and \$200.

What security is required? About half of all loans made are unsecured, extended on the signature of the borrower only. A big chunk are secured by chattel mortgages on the borrower's furniture; but these represent no real security. They do, however, give investigators an opportunity to appraise the general appearance of home and family more closely. A small percentage are secured by autos and cosigners.

What happens if I can't repay a loan? If you can't meet an instalment (and are wise enough to notify the lender at once), the first thing will be a conference to find out why you can't, and to work out some way in which you can pay in part or at some later date. If you just don't show up, you can expect the phone to start ringing and collectors to start calling.

You can also expect the company to be strict and persistent about trying to collect. It has to be. You needn't expect it to be nasty, however. There are fast operators in any business. If you should run into one who phones at midnight, calls on your neighbors, and makes threats, see a lawyer or the better business bureau. All reputable lenders frown on such tactics, and so

do the state authorities that administer small loan laws.

Will legal action be taken? Probably not. Ordinarily, taking you into court would cost more money and good will than a judgment would bring in.

A furniture mortgage, for instance, is practically never foreclosed these days, except in cases where a borrower is perfectly able to pay, but flatly refuses to do so.

Who borrows from small-loan companies? About half their customers are skilled or semiskilled laborers. White-collar workers and professional people represent more than a third. Unskilled workers and business proprietors account for roughly 8% each. Farmers, miners and folks with pensions or independent incomes make up the remaining fraction.

The bulk of lending is done to families in the \$1,800-\$4,000 class. Household Finance Corp. recently surveyed its borrowers and found an average monthly income of \$255. But borrowers are found in the lowest income brackets, and—surprisingly—in many of the higher ones.

Why do high-income people, many of whom could get bank credit, go to small-loan offices? Some go because they don't want anyone, including their banks and employers, to know they're in the hole. Others, who borrowed in less prosperous days, return because they liked the service given them. And some need the loan only for a few days, in which case a small-loan company can be the cheapest place to borrow.

Why do people borrow? Primarily to pay off debts. About 80% of all small loans go to pay creditors who can't or won't wait. But whether for debts or current expenses, the money is used for a wide variety of purposes.

About a fifth of the loans are used to "consolidate" debts—settle a lot of scattered obligations and take on one that can be paid off in instalments. Another fifth are used specifically for medical, dental and hospital expenses. Other uses: clothing, home repairs, business needs, taxes, mortgage payments, moving expenses, education and rent.

How do I get a loan? By going into an office and applying for it. An interviewer will ask the usual residence and employment questions. He will ask you what you want the money for, which will have an important bearing on whether the loan is granted. He'll ask whether you

for more information about small loans, read: "Small Loan Laws of the United States" and "Loan Sharks and Their Victims," nontechnical pamphlets from the Pollak Foundation for Economic Research, Winter Park, Fla. Price 20 cents each.

"Consumer Credit Cost Calculator," free from the Consumer Education Department, Household Finance Corp., 919 North Michigan Ave., Chicago 11, Ill. Use it to figure interest rates on any kind of instalment loan or purchase.

For facts and figures and background, get this one from your public library:

"Combating the Loan Shark," Winter 1941 issue of "Law and Contemporary Problems," Vol. VIII, No. 1, Duke University School of Law. Solid but readable.

have any debts outstanding, and list them. He'll ask how much rent you pay.

There will be an investigation which will take, depending on the kind of loan you want and how quickly you need the money, anywhere from half an hour to 24 hours.

Just as important as the investigation, however, will be the way the interviewer sizes you up during your conversation. If he's skillful, friendly and experienced, he can do it pretty accurately.

You'll get the loan if he pegs you as one who takes obligations seriously, has adequate income to carry the loan (a payment ordinarily equals 6% or 7% of monthly income), and lives in a style suited to earnings.

If You Borrow

IF YOU or anyone you know wants to borrow, there are rules for doing it.

In a state with no small-loan law, or an ineffective law, there's only one rule: Don't borrow unless you can get the loan from a bank or credit union or other legal lender, and all charges on the loan are equal to a true interest rate within the legal maximum.

But in any of the 33 states where lenders are licensed and regulated, here's what to do:

►Shop around. See if you're eligible for a loan from a credit union, a commercial or industrial bank or any other kind of lender that can give you money at cheaper rates. If not, continue to shop around among the small-loan offices. Compare costs.

►When you visit a loan company, look for the

state license. If it is not displayed, ask to see it. There are a few illegal operators even in regulated states.

► **Act like a customer.** Don't think the company is doing you a big favor or that there's anything furtive about the proceedings. You're dealing with an established business firm, and it wants your patronage. Don't be afraid to ask questions.

► **Determine the dollar cost of the loan.** You'll want to know the interest rates, and you will be accurately informed about them in a licensed office. But find out, too, the exact charges you will pay for a certain amount for a certain length of time. For most people this is an easier basis for comparing costs.

And that goes for other types of lenders, too. Not all of them are required to state their charges in the form of a true interest rate as small-loan companies are.

For example, a lender might offer a \$100 installment loan for 12 months at 6% interest. He charges a \$2 investigation fee, deducts interest in advance. The true rate is not 6%, but about 16% a year.

► **Know your state law.** You probably won't want to bother with looking up all the points of the law, but at least know the maximum interest rates.

Those are the facts about the small-loan business, and the more people who know the facts, the better.

Most licensed lenders are sensitive to public opinion and criticism, eager to explain the facts and figures of their business, and solidly behind the code of ethics set by their trade association, the National Consumer Finance Association.

If people understood the whys and hows of that business more clearly, it would be a more competitive one and hence an even better one. More people could borrow more money at lower rates of interest and with a clearer understanding of their rights as borrowers and customers. And fewer people would be left to the tender mercies of the loan shark.

For more about consumer credit: Watch for "What You Should Know About Credit Unions," "How to Figure Interest Rates," "Debt Can be Good," and other articles in future issues of this magazine.

The Kiplinger Magazine, June 1950

REET, N. W. WASHINGTON & D. C.

EXHIBIT D 5 (1) (480a)

SMALL-LOAN LAWS											
EFFECTIVE LAWS											
ALA.	ARK.	CA.	CO.	CT.	DE.	GA.	IA.	IL.	IN.	MD.	NE.
MI.	MO.	MT.	N.H.	N.J.	N.Y.	PA.	RI.	SC.	SD.	TN.	TX.
VA.	W.V.	WIS.	WY.								
PARTIALLY EFFECTIVE LAWS											
NEV.	N.M.	OKLA.									
INEFFECTIVE LAWS											
ALAB.	GA.	TEX.	WYO.								
MISS.											
D.C.	N.C.										
DEL.											
NO SMALL-LOAN LAWS											
KAN.	MONT.	S.C.									
MO.	N.D.	S.D.									
NOTE:											

D-5-11

326 In the United States Court of Appeals for the
First Circuit

No. 5206

AETNA FINANCE COMPANY, DEFENDANT-APPELLANT

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES
DEPARTMENT OF LABOR, PLAINTIFF-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF RHODE ISLAND

Appellee's appendix

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APPENDIX I

PERTINENT STATUTORY PROVISIONS

Extract From the Fair Labor Standards Act of 1938, as
Amended

(C. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U. S. C.
sec. 201)

SEC. 3. As used in this Act—

• • • •
(b) "Commerce" means trade, commerce, transportation,
transmission or communication among the several States or
between any State and any place outside thereof.
• • • •

(i) "Goods" means goods (including ships and marine
equipment), wares, products, commodities, merchandise, or
articles or subject of commerce of any character, or any part
or ingredient thereof, but does not include goods after their
delivery into the actual physical possession of the ultimate
consumer thereof other than a producer, manufacturer, or
processor thereof.

(j) "Produced" means produced, manufactured, mined,
handled, or in any other manner worked on in any State; and
for the purposes of this Act an employee shall be deemed to
have been engaged in the production of goods if such em-
ployee was employed in producing, manufacturing, mining,

handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof in any State.

SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of 328 the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

SEC. 11. (c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Secretary as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

SEC. 13 (a) The provisions of sections 6 and 7 shall not apply with respect to * * *. (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry;

SEC. 15 (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(2) to violate any of the provisions of section 6 or 7, or any of the provisions of any regulation or order of the Secretary issued under section 14;

(5) to violate any of the provisions of section 11 (c) or any regulation or order made or continued in effect under the provisions of section 11 (d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided*, That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

Extract From the Fair Labor Standards Amendments of 1949
(C. 737, 63 Stat. 910, 29 U. S. C. 20)

SEC. 16. (c) Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.

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APPENDIX II

EXTRACT FROM INTERPRETATIVE BULLETIN NO. 6, DECEMBER 7,
1938

29. Numerous letters have been received from banks (both commercial and savings), building and loan associations, per-

sonal loan companies [etc.] * * *. Each asserts that it is engaged in rendering "service." Although we recognize that the foregoing companies perform "services," it is nevertheless our opinion that such enterprises are not, in the ordinary case, sufficiently similar in character to retail establishments to be considered "service establishments" within the meaning of Section 13 (a) (2) 1941 WH Man. 272.

EXTRACTS FROM INTERPRETATIVE BULLETIN, 29 CFR 779

OCTOBER 1950

Section 779.7—Making Sales of Goods or Services

In order for an establishment to be considered for qualification for the 13 (a) (2) exemption, it must first be proved that the establishment is engaged in making *sales of goods or services* (or both). If the establishment is not engaged the statutory tests cannot be applied to it and its employees are not within the exemption. The term "goods" is defined in section 3 (i) of the Act but the Act does not define the term "services." The term "services," therefore, must be given a meaning consistent with its usage in ordinary speech, with the context in which it appears and with the legislative history of the exemption as it explains the scope, the purposes and the objectives of the exemption. Although in a very general sense every business might be said to perform a service it is clear from the context and the legislative history that all business establishments are not making sales of "services" of the type contemplated by the exemption. The exemption has reference only to sales of "services" of the type performed by

331 establishments which are traditionally recognized as local retail service establishments such as the restaurant, hotel, barber shop, repair shop, etc. The legislative history of the exemption shows the intention of Congress to exclude from its scope establishments such as those of banks, telephone companies, *credit companies* and other establishments of that type. These establishments and others which are not engaged in making sales of goods or "services" of the type to which the exemption refers, such as, for example, those of *personal finance companies* and building construction companies, are not service establishments within the meaning of the exemption. [Emphasis added.]

Section 779.9—Sales and Services Recognized as Retail

(b) *Legislative background: Types of exempt and non-exempt establishments.* In amending the retail or service establishment exemption as contained in section 13 (a) (2) of the Act of 1938, the legislative history of the amendments indicates that while it was the intention of the sponsors of the amendments to clarify what is meant by a retail sales or service, it was not their intention to expand the scope of the exemption as originally enacted in 1938 with reference to the type of establishment intended to be exempt. The declared purpose of the amendments was to confirm and to clarify that exemption.

(c) *The "Retail Concept," its applicability.* It will be observed that the sponsors of the amendment, in classifying industries on the basis of the applicability of the retail concept to their selling or servicing, did so on the basis of common knowledge as to what is recognized and what is not recognized as retail selling or servicing in the light of the objectives and purposes of the exemption as to the type of establishment it is intended to exempt. Thus, the dividing line between sales and services to which the retail concept is applicable and those to which it is not applicable is the general and common understanding of people of what constitutes a retail sale or service in the traditional sense. For example, people do not ordinarily think of the transactions of an insurance company as retail transactions nor do they think of an electric power company selling electrical energy to individuals as retail. The idea is alien to such transactions. But people ordinarily do think of the sales of a grocery store or of a filling station or of a restaurant as retail sales or services. *The retail concept, therefore, represents the common understanding of people generally as to what is meant by a retail sale or service or by a retail or service establishment. Only those sales or services to which the retail concept applies may be recognized as retail sales of goods or services for purposes of the exemption. Where there is no concept of retail selling or servicing the establishment does not qualify for the exemption. [Emphasis added.]*

Section 779.10—Lists of the Two Types of Establishments.

There are types of establishments in industries where it is not readily apparent whether the retail concept applies and whether or not the exemption is intended to apply. It is, therefore, not possible to give complete lists of the types of establishments whose sales and services are *not recognized as retail* or of the types of establishments whose sales and services *may be recognized as retail*. [Emphasis added.] It is possible, however, to give partial lists of both types of establishments. [Personal loan companies are included under the list entitled "*Types of establishments whose sales or services are not recognized as retail*."] 2

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APPENDIX III

TESTIMONY

Court's Exhibit 2

[251a] DAVID C. MELNICOFF, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

[252a] (Statement of Qualifications of David C. Melnicoff follows:

"1. Presently since end of 1950, Head, Department of Selective Credit Regulations, Federal Reserve Bank of Philadelphia. (Administered regulations in the field of installment credit and real estate credit.)

"2. Associate Economist, Federal Reserve Bank of Philadelphia. Dept. of Research. Since 1946.

"3. Graduate U. of P. B. A., M. A.

"4. Instructor in Economics, American Institute of Banking, 1949, 1950.

"5. Asst. Economist OPA—1941—1942.

"6. Publications (articles) in field of business analysis, mainly in The Business Review of the Federal Reserve Bank of Phila., Real Estate trade magazine and journals.

"7. President, Phila. Chapter American Statistical Association.

"8. Past Chairman, Philadelphia Economists Group.")

By the COURT:

Q. What is your present position? That is all I want to know now.

A. My present position is with the Federal Reserve Bank of [253a] Philadelphia as head of the department of Selective Credit Regulations, the regulations which administer, among other things, Regulation W concerning Consumer Credit.

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By Mr. WEINER:

Q. do you have personal knowledge of the small loan business?

A. I do.

Q. Would you state what your knowledge is of that?

[254a] A. My knowledge of that business comes by reason of the fact that I am head of the Department of Selective Credit Regulations, within the Federal Reserve Bank of Philadelphia, which has as its duties the administration of Regulation W; and in the course of that administration and the enforcement of Regulation W, investigators under my general supervision examine the books and records and speak with the people who work in the small loan industry and within specific branch offices of small loan companies and question them as to the intimate details of business. I review all of these details and frequently engage personally in the investigation.

Q. Now, the issue in this case, in this part of the case, is whether the Lancaster Office of the defendant corporation is a retail establishment within the meaning of Section 13 (a) (2), Fair Labor Standards Act of 1938, as amended.

In order to qualify for this exemption, an establishment must meet the three following tests. First, the establishment must be engaged in performing service. Second the establishment must be engaged in making sales of goods or services or both. It has been stipulated in this case that it is not engaged in making sales of goods.

Third, at least 75 percent of the establishment's annual dollar volume sales of ~~services~~ must be from sales of services which are not for resale and are recognized as retail services in the industry.

Now, having read the stipulation and the supplemental stipulation and from your personal knowledge of the small loan business, we would like to have your opinion on these questions: First, is the Lancaster Office of Household engaged in performing services—

[255a] A. Within what I conceive to be the generally
335 accepted meaning of your phrase "performing services" and within the context of your question, I would say that the Lancaster Office of the Household Finance Company, being a small loan company, would be engaged in the business of performing services. I would like, however, to qualify that answer somewhat.

[256a] Q. Proceed.

A. I must confess that I find some difficulty with the question and I must inform the Court that I was somewhat confused by this morning's testimony with regard to services and the manner in which the word has been used here.

The word "services" used in a very broad generic sense will apply to any economic endeavor in our economy, in our social system. Everybody who receives a payment for doing something is engaged in performing some kind of service.

Therefore, the question, is the small loan company performing a service or is any particular industry performing a service, out of context, has no particular meaning.

Of course they are performing some service. There would be no economic reason for their existence if they were not.

The question that you have asked, however, I interpret to mean: are they performing a service within the generally accepted meaning of the word as it is used in the business community, in economic discussions, economic analyses and so on, and my answer there is no, that they are not performing such services, that that term is reserved for other types of functions.

Q. Would they be performing services as understood in the financial industry?

A. You have taken one step further now and interjected the whole financial industry and my answer would be the same there, that within my understanding of the term services and performance of services, the financial industry as a group of establishments or businesses of related nature is not perform-

ing services but it is doing something else, something which can be more specific than that.

Q. Now, secondly, is the Lancaster Office engaged in making sales of services?

[257a] A. It would follow from my previous answer that, again, in the accepted, generally used meaning of the
336 term, they are not engaged in selling services. I might go further and say they are engaged in the business of making loans or lending money, which has a different connotation and I think the meaning is different than that of performing services, as it is generally understood.

Q. Could you say that the services, could you say that they are recognized as retail services in the financial industry?

A. I would—I would say that the term “retail” or “retailing,” while it, I know that it has been used and may be used in a very limited sense in the financial industry, does not have any place there in the—again, within general usage, and that, therefore, to speak of retail activities within the financial industry is not meaningful, and I wouldn’t know how in my general knowledge of the field, how it should be construed.

I could say, therefore, that they are not engaged in retail services or retail selling or anything of the sort.

I wonder if I might expand on these three questions which you have asked?

Q. Yes, certainly, go ahead.

A. With regard to what I understand has already been offered in evidence, the “Standard Industrial Classification Manual,” we are dealing here, it seems to me, with the meaning of words as well as with matters of substance. In part, this argument as I have heard it seems to me to be a question of semantics. I therefore want to discuss this “Standard Industrial Classification Manual” as it seems to me to relate to this matter.

The background of this manual is that for many years statisticians, economists and others in the field of economics had been working at sometimes at cross purposes gathering statistics and making statements, [258a] speaking about this industry, that industry, the other industry, without knowing precisely what was meant. The committee got together back in the late '30's, sought advice from all comers and finally came up with a classification of industries.

What they tried to do—and this is secondhand knowledge on my part, because I did not have any direct hand, of course, in setting up this classification—what they tried to do
 337 was to make a classification which was meaningful for economic endeavor, for economic analysis for those who were in business and in government, and one that would conform to the structure of American industry and to general usage, to the attitudes of businessmen and government administrators in the field.

They divided American Industry into several large groups of industries. Among them were trade, manufacturing, agriculture, and so on.

Within trade they designated wholesale and retail as subgroups.

An entirely separate group of industries was the financial group—finance, insurance and real estate. There is no designation of wholesale and retail within that.

An entirely separate group was the group of industries known as service industries, and it is so that that I want to turn for a moment, because it bears on this question of what is a service, and is the loan company selling a service?

This question, of course, had to be discussed by the men who were getting together this classification, because they wanted to make it as useful as possible and conform as closely as it could within the technical requirements to the language of the day, of business, so that it would be understood.

They speak in a very small introduction to the services division of the general nature of the industries which they have put into it. They state in the second paragraph on page 119:

“Certain types of establishments performing unique services of importance in the general pattern of industry are excluded from this division. Such establishments are banks and other financial institutions, insurance companies, construction companies, and public utilities.”

[260a] (Standard Industrial Classification Manual, Volume II; Nonmanufacturing Industries, 1942 Edition, was marked Exhibit G-7.) The witness called particular attention to page 119, which reads as follows:

338.

Exhibit G-7 (page 119)

[261a]

"SERVICES"

"THE DIVISION AS A WHOLE"

"This division includes a heterogeneous group of establishments which are primarily engaged in rendering services to individuals and business establishments and which are not classified in other industrial divisions. Included in this division are hotels and other lodging places; establishments providing personal, business, repair, and amusement services; medical, legal, engineering, and other professional services; educational institutions; nonprofit membership organizations; and other miscellaneous services. These establishments derive their principal income from the sale of their services, as distinguished from trade establishments, whose principal source of revenue is the sale of merchandise.

"Certain types of establishments performing unique services of importance in the general pattern of industry are excluded from this division. Such establishments are banks and other financial institutions, insurance companies, construction companies, and public utilities."

A. It makes the point that while there are other, there are other [262a] types of establishments which perform services they are of a unique nature and are, therefore, excluded; and the financial group is excluded, and I think quite properly. The services which they perform are unique. They differ so greatly from other types of services that there are, in fact, not only differences of degrees but differences in kind. And what the committee which formulated this classification was doing was merely recognizing an established fact, that the services performed by the financial community are separate and distinct from services as understood in the sense of personal services and things of that kind.

By the COURT:

Q. In other words, in the most general sense, the corner grocer performs services?

A. Absolutely.

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Q. Although he could not be classified as a service—

A. No, sir.

Q. Establishment.

A. No, sir.

[263a] A. I might state further, I answered that within the financial industry, I did not see that the word "retail" or "retailing" had any accepted place, except in a most limited sense.

I might make some analogy there, in view of the testimony which I heard this morning, and I cannot help being stimulated by that. There seems to be some question as to what part of the financial industry or the group of businesses that are spoken of as the financial industry, what part of those is retail and what part of those is wholesale. I pointed out that the Standard Industrial Classification Manual includes a subgroup, wholesale and retail with respect to trade, industry, but does not include one with respect to the financial group. The reason it does not is that that classification is simply not relevant to the field of finance.

To use an analogy from the field of zoology—in which I am not expert—the class of vertebrates—well, there is a class of animal which is vertebrates and a class which is invertebrates. Within the vertebrate class there is a distinction of mammals and fish, and the [264a] classification of mammals and fish has no meaning to the invertebrate classification. Consequently, tests of that classification cannot be employed.

Now, I think that this can be used as an analogy for the classification here. This is a rather formal way of stating it but I think that the general usage is approximately that of this formal analogy.

Q. Mr. Melnickoff, you mentioned that the word "retail" was used in a limited way in industry. I would like to show you Defendant's Exhibit D-5, entitled "Sales Finance Companies, April, 1951", and ask you whether or not that is one of the limited ways that you speak of.

A. No, this wouldn't have a bearing on that point, I would be willing to discuss this now if you want me to do so.

340 Q. All right, proceed.

A. This document presents statistics gathered from sales finance companies. It refers to retail financing and to wholesale financing. The terms there are used for convenience, and they mean financing which—retail financing means financing which arises out of the retail sales of merchandise.

Wholesale financing means credit which arises out of the wholesale sale of merchandise. It would not be relevant to this particular release, but it would be perfectly analogous to include another category here, manufacturing financing, which would mean credit for financing arising out of the manufacturing process.

By the COURT:

[265a] Q. In other words, you read it as if it was retail sales financing and wholesale sales financing?

A. That is exactly what this means. Wholesale financing means credit which arises out of wholesale transactions and not—it refers to the transactions and not to the financing operation.

[274a] Cross-examination by Mr. ZORN:

Q. * * * This is a comparatively recent article published in 1951. "A relatively high cost is inevitable because of the very nature of such loans. They represent a case in retailing. And retailing in any line, whether in loans or in groceries, costs more per hundred dollars of business done than does wholesaling in the same line. Moreover, they represent a case of retailing very small amounts * * *"

And then he proceeds; I won't read it all to you. I interpret that statement, Mr. Melnicoff, by Professor Phelps as a statement that regards the small loan business as being engaged in retailing in the same sense that the grocery store is engaged in retailing.

A. I would not so interpret the statement. Not seeing the full text, of course I can't be sure, but I would say from what I have seen that what Dr. Phelps is saying is that the consumer credit industry or the small loan field, if that is what he is talking about, has certain problems which are analogous to those of the grocery store, and I would not deny that.

341 But that is a very different thing from jumping to the conclusion that the small loan company is a retailing establishment in the same sense that a grocery store or any other retail establishment is.

Q. That is subject to interpretation of the language used. That is your interpretation.

Let me ask you whether you can arrive at the same interpretation if you look at the statement made by Dr. Wilford King,

who is Professor of Economics at New York University. He is well known, isn't he, as an economist?

A. Yes.

[275a] Q. And in this article, Dr. King says, "In dealing with the question of rates, one must remember that, in general, the commercial banks are wholesalers of credit, while the small loan companies are retailers of credit"—and you may look at the entire thing. Skipping some parts of it, he says, "Clearly, retailing requires a much larger rate of profit than does wholesaling."

A. My comment with respect to that quotation is about the same. In a manner of speaking—and I believe that is the way Dr. King is regarding this subject—in a manner of speaking with respect to the size of the loans, perhaps, and the nature of some of the operating problems, there are certain aspects of the retailing industries which may be found in certain parts of the banking or the small loan field. That, again, is with reference to a specific problem, the problem of operating costs or the problem of compensation rates. I would not say that you could draw from that the inference or make the inference that, therefore, a small loan company is like a retail establishment or is a retail establishment within the general meaning of that term.

Q. We are not considering here, Mr. Melnicoff, the legal interpretation of retail establishment in law, unless you are a lawyer and would like to discuss that problem with me.

A. I am not.

Q. We are discussing the recognition, the issue as to whether or not, within the financial industry and generally by economists and experts, there is an understood concept or a
342 recognized concept of retail or wholesale throughout the financial industry in connection with making various types of loans.

A. I understand your testimony, you say that, to your knowledge, and on the basis of your experience which you have described, there is no such accepted concept at all, either that commercial banks are [276a] engaged in wholesaling credit or that small loan companies are engaged in the retailing of credit. Is that a fair summary of your testimony?

A. Yes; subject to the qualification that in some limited ways, there are certain aspects of the retailing problem which apply to banks and small loan companies.

Q. Let me ask you this. First, our friend Dr. Neifeld, in a quotation from his book which appears in Defendant's Exhibit D-2, makes the flat, direct statement; he says, "Personal finance is retail banking." And you can look at the context of that and the rest of the statement and I ask you whether that is, or if you can interpret that as an inferential statement related to something else by way of comparability, or whether it isn't precisely what he says? He is making a direct statement. Could you make the same qualification with respect to Dr. Neifeld that you have made with respect to some of the others?

A. Yes, I would say that Dr. Neifeld is there using a figure of speech, as he so often does.

Q. We have also introduced in evidence—and I won't take the time with you, Mr. Melnicoff, to go through all of them—a great many documents and articles, many written by experts and writers as far back as 1930, 1931, 1932. We have introduced in evidence advertising of the industry itself both the small loan industry and the financial industry generally, in which over a period of years, ever since 1930, or earlier, the terms "wholesale" and "retail" have been used constantly. With that fact—

Mr. WEINER. Wait a minute; that has been introduced subject to the Government's objection. I think it ought to be made clear to the witness the circumstances under which it has been introduced.

Mr. ZORN. This is cross-examination. I am not trying to validate those things to him. I am simply asking him about them, sir.

[277a] By Mr. ZORN:

Q. Do you understand the question, sir? The question I want to ask is this: If there is such a volume of literature as I have suggested in which the concept "retail" and "wholesale" has been used over all these years, and used as effectively as I have indicated, wouldn't that in any respect alter your opinion, which you expressed before, that virtually this term is unheard of in the financial industry?

A. No, that would not alter my opinion. I think I am familiar with the type of thing to which you are referring and my comment with respect to all of them—I do not know what volume you have—would be the same, that they are dealing with special circumstances, very limited circumstances, and the words "wholesaling" and "retailing" are used in a special sense.

much as one might refer to the wholesale slaughter of innocents when a bomb is dropped. That is certainly not wholesale trade. That is a little far drawn, but the principle is the same. The same type of language is used.

If I may just go on to add, when I or the general public am told that we are dealing here with a problem in retailing, or we are going to discuss retailing, what I think of is retail trade, mainly, certain other establishments outside the field of trade. When I am told that we are dealing with a financial matter, I immediately think of all the institutions, including loan companies, in the field of finance.

The quotations to which you have referred, and the other documents to which you have referred, I believe if I had a chance to inspect them, would not change my view that the only sense in which wholesaling and retailing is used is a very specialized one and in a manner of speaking or figurative sense as applied to the industry, and I think that almost always it can be shown to be used in illustrating or talking about a particular problem within the industry and not in the sense that the general public or the general [278a] business community would understand the word.

344 [362a] DONALD F. BLANKERTZ, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

(Statement of qualifications of Dr. Donald F. Blankertz follows:

"Teacher of graduate and undergraduate classes in Marketing Research, Retailing and other Marketing courses. Member of the Faculties of the Wharton School, the Wharton Graduate School, and the Graduate School of the University.

"Holds degrees from the University of Michigan, A. B. (1934) M. B. A. (1935) and Ph. D. in Business (1942).

"Experience includes: Teacher of Marketing subjects at Indiana University (three years) and at Wharton School (six years); Member of Wholesale and Retail Trades Division, Office of Civilian Supply and Assistant to Director of Research Staff of the Office of Civilian Supply; Supply Analyst in Reports and Control Section of the Assistant Chief of Air Staff

for Material and Services, Headquarters, Army Air Forces and Special Research Assistant to Chief of Supply Division, Hq., AAF; Foreman of the Keeler Brass Co. and Adjuster for the General Exchange Insurance Corp.

"Author of books: *Marketing Cooperatives*, The Ronald Press Co., New York, 1940; *Profitable Retail Advertising* (with Joseph Rowen), The Ronald Press Co., New York, 1951; contributor to *Theory in Marketing*, Richard D. Irwin, Inc., Chicago, 1950.

"Author of articles: "What Do You Know about Your Customers." *The Journal of Retailing*, Spring, 1950; "Motivation and Rationalization in Retail Buying," *The Public Opinion Quarterly*, Winter 1949-1950; "Shopping Habits and Income," *The Journal of Marketing*, January, 1950; "The Basement Store Customer," *The Journal of Marketing*, January, 1951; "Customer Patronage of a Parent and Branch Store," *The Journal of Marketing*, October, 1951.

Other publications: *Packaging Costs*, American Management Association series, 1943 (co-author); *Suggested-*
345 *Selling Practices*, [364a] Indiana University, articles, book reviews and government Monographs and Reports.

"Private Consultant to or researcher for numerous companies including Miles Laboratories, Inc., Reiss Advertising, Federated Department Stores, the University of Pennsylvania Press, Lit Brothers, Council for Cooperative Development, American Watch Assemblers, Inc., Greeting Card Guild and S-M News Co.")

Q. Now, you read the stipulation and the supplemental stipulation filed in this case and you are acquainted with the operations of Lancaster Office of Household Finance Corporation and Household Consumer Discount Company?

A. Yes.

Q. Now, the issue in this part of the case is whether the Lancaster Office of defendant corporation is a retail establishment within the meaning of Section 13 (a) (2), Fair Labor Standards Act, as amended, of 1938; in other words, to qualify for this exemption, an establishment must meet the three following tests:

First, the establishment must be engaged in performing services.

Secondly, the establishment must be engaged in selling—in making sales of goods or services or both. It has been stipulated that it is not engaged in the making of sales of goods.

Third, at least 75 percent of the establishment's annual dollar volume of sales of services must be from sales of services which are not for resale and are recognized as retail services in the industry.

Having read the stipulation and the supplemental stipulation [365a] and, on the basis of these stipulations, we would like to have your opinion on these three questions:

First, does the Lancaster Office engage in performing services?

A. Yes.

Q. Does the Lancaster Office engage in making sales of services in your opinion?

A. No; it does not.

Q. Are they recognized as retail services in the financial industry?

346 A. I would say no, they are not.

Q. Now you have given us your answers to these three questions and we would like to have any statement of clarification or further explanation of your answers that you may wish to give us at this time.

A. Yes, the problem obviously is one of nomenclature and terminology. I think it might be appropriate if I considered as a teacher of Retailing and Marketing generally, of which retailing is a part, the consideration of the terminology which usually would arise in attempting to distinguish them.

The recognition which we give in the profession to terminology usually stems from certain specific sources. One of our primary references is the American Marketing Association's Committee on Definitions, whose latest report was in October of 1948 in The Journal of Marketing, the official organ of the professional society.

In there, they consider the term "retail," of course, as being part of the field of Marketing.

The recognition which they accord there is one test of exclusion, I think, the fact that a retailer has to be distinguished by sale to the ultimate consumer.

They quite properly, from the development of the field, do not [366a] recognize size as any valid criterion. It may be useful for recognition purposes but not to a valid criterion to specifically enumerate and assess any particular retailer or is not a retailer of size.

The conditions of sale also are expressed rather than the method of procurement—

By Mr. ZORN:

Q. Excuse me; rather than the method of what?

A. Procurement, the way the retailer may buy his goods or the quantity or the methods; the condition of his sale, not his method of buying for himself.

We also place reliance on the Marketing Handbook, so-called, which is a basic coverage of the field. In that handbook, they give no recognition to financial institutions, which is part of my answer why they have no such recognition. They do not recognize them as being in the field of Marketing: the concept of retailing is lacking.

347 We obviously rely on the census for many definitions we use not only as teachers but as statisticians, as researchers, and the census bureau, again, does not classify financial institutions as retailing and that is why I have so said that I did not consider them retailing.

A more general reliance that we place comes from a number of specific sources, most of which—the census being the only exception—feel no burden on them to enumerate the specific retailer which would be incorporated under such definitions as they offer. The census is of course, the exception, where they do so classify because it is a statistical type of service which they render.

In general, we would rely upon the acknowledged writers in the field who are not always pedagogues but business men frequently, combination of teacher and professional man or practitioner of busi-[367a]ness, which is extremely common in my field.

In none of these books would you find, although many of them attempt a rather complete enumeration for illustration purposes to show the students where the retailers are, what they are like. None of those recognize the financial institutions as being properly a part of marketing or of retailing—either the general texts on marketing which have large sections on retailing or the specific, basic texts which are recognized in the field, which I could enumerate if you wish at a later time.

Another aspect of the problem of terminology, it seems to me, would have to have more direct reference to retailing as we understand it, as a field of business. From my knowledge of that, their publications, which are their trade association publications, their method of bringing their ideas out, their participation in our association and their trade association ac-

tivities—I know them and so on—they accord no such recognition to financial institutions, which is part, again, of the reason for my answer.

So that I would say from my knowledge of the field, the experience of its literature and my personal experience in the field that we are with some ease able to recognize retailers as a type. We are not in this case, as nobody is, I think, in any case, completely in agreement on all particular identifications.

348 We think we have tests which are reasonable so that reasonable men would agree on.

There is another aspect and that, perhaps, is a public one; as Mr. Henderson spoke, none of us can speak for the public. I think, we have no direct evidence that I know of anybody having attempted a public opinion poll on what they consider to be a retailer.

I feel, however, again purely as an opinion, that from the studies I have engaged in in research and concerning shopping of [368a] people, their behavior as consumers, they would not so recognize financial institutions of any kind as being a retailing purchase; so that as a generalized opinion on the issue which is, as we all recognize, related to the application of our terminology to a specific type, it would be a serious omission, it would seem to me, that in all that literature, in all that experience and attempt to be professional, that the basic literature of the field should ignore a field so large as the small loan companies from their entire treatment in teaching, in the literature which they write and the operations which they engage in; whereas they do, for instance, enumerate very small and specific types and discuss them and illustrate them.

The question was raised as to what we teach in Marketing at the University of Pennsylvania and in Retailing. We do, in one sense, include all the things which were enumerated by Mr. Zorn. We have one course in retailing. We are not a vocational school. That course attempts to deal with the fundamentals of retailing and does embrace those things which are known fairly commonly, as service establishments and sometimes with the words retail service establishments.

So that in terms of basic problems of retailing, as we conceive of it, as we gathered from the information, we would be again seriously delinquent to have omitted completely from consideration that type of retailing, were it to be such, that

is, the financial operations which we do not consider to be retailing.

That, I think, is some explanation of the answers I gave.

349 Cross-examination by Mr. ZORN:

[377a] Q. Let's take, as an example—I am trying to get your thinking on this, Dr. Blankertz—I go into a dress suit rental establishment because I have suddenly been invited to a wedding and don't have a dress suit, and I go in there and I rent that dress suit and I pay the man a fee for that. Now, he is rendering a service, isn't he, to me?

A. Well—

Q. Would you say that he is selling me a service?

A. In that case, I would, yes.

Q. He is selling me a service?

A. Yes.

Q. Now, what is the service that is being sold and what constitutes the sale?

A. He is handling a good under a particular type of situation. It is definitely an economic marketing good which he has done. It has been rendered to your person or your property which would be the way—

Q. It isn't my property at all, it is his property.

A. I know, but to your person or property—

Q. He owns it. He is letting me have the use of a dress suit for a specified period for which I pay him; is that right?

A. That is right.

Q. So, therefore, you would consider that as a sale of a service?

A. Yes.

By the Court:

Q. It seems to me—maybe I am wrong, but am I right in saying that you take as the criterion as to whether the services are sold or rendered that the concept of marketing is really what pretty well determines it?

[378a] A. And the concept of retailing underneath it.

Q. Yes, marketing and retailing—

A. History.

Q. In other words, the lawyer doesn't consider that con-

cept of marketing; it never enters into the lawyer's head. It probably might with the barber shop, is that right?

A. More clearly so there, yes, because there—

350 Q. Well, now, your dress suit rental fellow would fall into your concept of marketing because he is selling a service, he is letting me have the use of something for which I pay him?

A. Yes.

Q. Now, how can you possibly distinguish that, Mr. Blankertz, from a fellow coming into a small loan office and saying, "I would like to use a hundred dollars of your money and give it back to you a month from now and have the use of it for the month, for which I will pay you an interest rate of X amount?"

A. Very easily, I think. You obviously might not think so. Although we speak about the sale of commodities, we recognize that sale, for instance, of a car is a conditional sale. He gets the use of that car. The term sale is obviously part of terminal activities. The use of commodities and the use of "sale" in terms of use of commodities doesn't mean an outright passage of ownership. However, money we do not regard as a commodity. It is not something you can consume. You can consume a service but you can't consume money.

Court Exhibit I

[43a] LEON HENDERSON, having been duly sworn, was examined and testified as follows:

Direct examination by Mr. ZORN:

[68a] Q. Just so that the record is clear on that, in connection with your Russell Sage activities, you had occasion to deal with railroad people, that is, railroad executives; you had occasion to deal with bankers and investment house people; is that correct?

A. That is right.

Q. What other groups in the communities in the various states with which you operated—with what other groups was this problem discussed? I am trying to get now the opinion which existed at that time and among what groups it existed.

A. I would say as a research worker, my first contact was with research organizations and I was surprised at how little had been done in the way of research and recordation of data, and so I dealt with the principal research agencies.

351 Then with the National Better Business Bureau and the individual city Better Business Bureaus; then with the national organization for Legal Aid Societies which was an organization of the Legal Aid Societies in the various cities; and, too, the Junior Chamber of Commerce made this question of protection of the necessitous borrower one of their items in the program and I worked directly with them nationally and in their local groups.

* * * * *

[69a] Q. I think you have made it clear, Mr. Henderson, that throughout this entire period of your activity with the Russell Sage Foundation, and in all of your contacts and discussions, there was a common understanding or a general recognition that the small loan business was a retail business. How did that question happen to be considered in connection with the sponsorship and passage of this legislation? What brought it forward?

A. The principal thing, of course, was the discussion (if that is a strong enough word) of the need for a higher than the banking rate or the established usury law rate in the state. The long studies of the Sage Foundation and their special experience [70a] with the remedial loan societies had given them some idea of what the cost of making small loans and collecting them in installment payments was, and this whole idea was to try to set up a business which would have the same ethical concepts and deal with its customers on the same basis as all other retail functions in the community.

The Sage Foundation was very courageous, I think, in taking this stand on the necessity of a rate at that time, early, of 3.5 percent a month, and it required quite a bit of delineation to bankers and to state legislatures and to labor groups and everybody else, and the natural "parallel" was to the retail business, and in fact some of our argument and that of—I can recall the study in New Jersey by Wilford I. King compared the markup, you see, at retail with the markup of retailing of small sums; and so it was part and parcel of the presentation, argument or discussion, whatever you want to

say—fortification—of the suggestion for adoption of the Uniform Small Loan law.

352 Q. If I understand you correctly, Mr. Henderson, the subject as to whether or not this was a retail business came up in connection with the interest rate which was recommended by the Foundation in the Uniform Small Loan laws in order to distinguish this type of operation from businesses which had generally been controlled by a 6-percent law; is that correct?

A. That is right.

By the COURT:

Q. It was just an argument which was used. You have said this is like a retail sale and retailers get more than wholesalers and they ought to have more, or something of that sort, along those lines.

A. That is right, and we stated that it was the retail end of the lending business.

[91a] A. I am somewhat cautious. Your Honor, on this matter of the word "sale" because I spoke of these salary buyers, and we always looked at a transaction as not being a sale, but certainly the money of the wholesalers, as I have denominated them, is not only used in the furtherance of mercantile business and manufacturing business but is very frequently extended to those who deal in small sums. I think practically any of the group in the industrial banking field or in the personal loans particularly would be going to the wholesalers for financing. I think the record of it doesn't show it. I know it very well.

[101a] Q. Well, now, Mr. Henderson, you have just heard our stipulation that the Lancaster office of Household and Household Discount, as described in the stipulation, is not engaged in the sale of goods. It is your testimony, as I understand it, that the Lancaster office, like other small loan offices, is engaged in the performance of a service or you might describe it as the sale of a service; is that correct?

Yes. I would say that it was a service, certainly, as distinguished from a good.

Q. Well, then, now, will you proceed—

353

By the COURT:

Q. May I ask this? Do you consider that every business or industrial establishment is engaged in either the sale of goods or the sale of services? Are there any such things that are not doing either, which are in business, I mean?

A. Your Honor, I don't know—and I would like to refer to a job which I did this year in connection with the excise tax, we took what is known as the Department of Commerce table, personal consumption expenditures, which accounts for a tremendous total of the sales to individuals in their capacity as consumers, and we broke that down into which of the goods and which of the services, two tables, were under excise taxes and what part of their volume was out, and in that connection we used this personal consumption expenditures table of the Department of Commerce, and they divide all of those expenditures into either services or goods.

Q. Well, now, is that your view, that everything in business or industry has to be the sale of a service or the sale of goods?

A. Well, everything that I can remember now, yes, is goods or services.

Cross-examination by Mr. WEINER:

[119a] Q. I would like to ask you, Mr. Henderson, is a telephone service a service to the consumer?

A. It is so called when you are distinguishing between goods and services.

Q. Would you call that a retail service?

A. Well, the telephone service is both retail and wholesale. In connection with the work I spoke about that we are doing on excise taxes, I undertook to do what I think is the first job of its kind, which was to try to find out how much was spent in the various categories on which excise taxes were laid which were for business purposes and which were for other purposes, and I don't have handy what the division was, but certainly a larger part of the local telephone service was for personal account and, therefore, was a consumer service.

Q. Would you call that a retail service?

354

A. First, I would call it a service, and where it is going to personal consumption, services, I certainly would.

By the COURT:

Q. Is telephone service ever resold?

A. The distinction that I made, Your Honor, at one level was a service to business. I would doubt, except in some special kinds of these answering services or something else, the usual context, that it is, no.

Q. You really couldn't do it legally, could you? I doubt if the commissions would allow it.

By Mr. WEINER:

[120a] Q. Is a transportation service a service to the consumer?

A. If it is personal transportation, I would say yes.

Q. And would it therefore be a retail service?

A. It would be a retail service, I would say if it met these various other tests, and the ultimate consumer. I would consider it so.

Q. You would consider it as a retail service?

A. I think so.

Q. Would you consider services of a gas company, for instance, a service to the ultimate consumer?

A. You mean gas that is used for cooking in the household?

Q. Yes.

A. I would consider it as a service.

Q. Would you consider it as a retail service?

A. If it was being sold in those small quantities and if it was directed toward the ultimate consumer, I certainly would consider it a service, and I would consider it a retail service.

Q. Would you say that the sale of an insurance policy is a retail transaction?

A. To me, to an individual?

Q. To an individual.

A. It would be called that under a personal consumption expense allocation, certainly.

Q. Under the specific allocation, you say, it would be a retail transaction. Would it generally be regarded, in your opinion, as a retail transaction?

355 A. The selling of insurance in small sums generally to people on their own personal lives, I would say would be regarded as a retail service. I see no reason why not.

[130a] Q. Going back to your experience in the 1930's, Mr. Henderson, you say that you had many dealings with research agencies, Better Business Bureau, National Organization for Legal Aid Societies, Junior Chamber of Commerce, State Banking officials, National City Bank, A. F. of L., Federal Reserve Board, and so forth. In what respect particularly did the Better Business Bureau recognize the small loan company as a retail business?

A. Well, there were two things that I think the Better Business Bureau did in cooperation with the Sage Foundation and others. One was to help bring about the prosecution of salary buyers and other loan sharks, and the second, they supported and participated with committees that were suggesting remedial or regulatory acts, and in that connection the Better Business Bureaus said that, were explaining as we had been doing, that this was the retail end of the financial business.

Q. Who were they explaining that to?

A. Well, sometimes they were explaining it to their own people and sometimes they were explaining it to committees of the State legislatures that were considering small loan legislation.

Now, whether they regarded it as comparable or exactly, I couldn't say. I know in my dealings with them, and because they took up the burden within a community with the Legal Aid Societies and others saying to State legislatures and committees of citizens that this business needs a higher rate because it is a retail business.

[155a] ELMER E. SCHMUS, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

[157a] Q. And you have made loans or extended credit to Household Finance ever since that time and still do?

356 A. And still do.

Q. But Household Finance is not the only small loan company which receives lines of credit from your bank or has received them in the past; is that correct?

A. That is right.

Q. Is it only one of them?

A. Only one of a great number of companies that we lend to.

* * *
Cross-examination by Mr. VOTAW:

[200a] Q. What exactly is being sold to the customer when the loan is made?

A. What is being sold?

Q. Yes.

A. There is a medium of exchange that is being handed to the customer when the loan is made.

Q. The note?

A. No, that is received.

Q. Oh, the money?

A. There is a medium of exchange.

Q. The check or cash or whatever it is?

A. That is right.

Q. And that is what is being sold to the customer?

A. That is right.

* * *
[202a] Q. What would you define as the annual dollar volume of sales of a personal finance company?

A. I am not too sure that I follow that: the annual dollar sales of a personal finance company?

[203a] Q. You have testified that Household Finance Company, in its operations in Lancaster, was a retail establishment within the meaning of the Fair Labor Standards Act. That is correct?

A. That is right.

Q. And you know that part of the definition of a retail establishment is that more than 75 percent of the annual dollar volume of its sales of services is recognized as retail and is not for resale. What do you understand by the annual dollar volume of the sales of services of the Household Finance Company branch at Lancaster?

357 A. It would be all of the advances of sales of services that they made in that particular office.

Q. All the advances they made, all of their expenditures?

A. All of their advances to the individual borrowers, yes. That is the sale of their service.

Q. Would you consider the loans which the First National Bank of Chicago makes to individuals as their dollar volume of sales?

A. No, not just to individuals. It would have to be to commerce and industry, whatever loans we make. We make a great variety of advances.

Q. And the total volume of your advances is the total dollar volume of your sales?

A. That is right, plus a lot of other different items—letters of credit, travelers' checks, government bonds, services, for instance, of our trust department.

Q. And investment of various kinds?

A. That is true.

[204a] Q. The volume of sales, that is, the amount you receive for the sales, includes the amount of money you loan?

A. What do you mean by the amount received from the sales? We are talking about Household. The amount received from the sales: They are making the sales to individuals, the sale of services in the shape of advances, loans.

Q. Then a shoe company, a retail shoe store sells shoes at \$5 a pair—if you can get any at that these days—and the \$5 is their receipts?

A. That is right.

Q. Not the shoes?

A. That is right.

Q. Now, when a loan company loans a hundred dollars you say the hundred dollars is the volume of their sales?

A. That is right.

358 [218a] JOSEPH P. DREIBELBIS, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

[222a] Q. And can you tell us, then, what was the legal basis for the Executive Order and Regulations W, at least as you understood it?

[223a] A. Well, the Executive Order was issued primarily on the emergency powers of the President as set out in the Trading With The Enemy Act of 1917, as subsequently amended

after the Banking Holiday in 1933, which gave the President the power in an emergency to regulate the transfer of credit or the payments by or to banking institutions as defined by the President.

Q. In other words, the businesses which were made subject to Regulation W were defined under the term banking institutions, is that correct?

A. Correct.

Q. As that term was used in the Trading With The Enemy Act?

A. Correct.

The COURT. No, you said as the President defined the term.

Mr. ZORN. As defined by the President.

The WITNESS. Oh, in the Trading With The Enemy Act, Your Honor, it gave the President the authority in an emergency declared by the President to define banking—

[224a] Q. So that whoever may have defined the scope of the term "banks" or "banking institutions," it is the fact, is it not, that in the promulgation and in the drafting, formulation of Regulation W, department stores, retail furniture stores, retail appliance stores, and similar retail stores, which sold on a charge basis, were classified as a banking institution for the purposes of that order, is that correct?

A. Yes; the extension of credit is a banking function, as is the deposit function, and the Board defined those institutions that were extending the type of credit which the Board
359 felt in the public interest should be regulated in that period as banks.

360 Minute Entry of Argument and Submission—February
11, 1958

(OMITTED IN PRINTING)

In United States Court of Appeals

Judgment

Filed April 15, 1958

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF KENTUCKY

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed, with instruction to the District Court to set aside the injunction.

361 In United States Court of Appeals for the Sixth Circuit

No. 13287

KENTUCKY FINANCE COMPANY, INC. AND KENTUCKY
DISCOUNT, INC., APPELLANTS

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF KENTUCKY

Decided April 15, 1958

Before SIMONS, Chief Judge, ALLEN and MILLER, Circuit
Judges

Opinion

[File endorsement omitted]

SIMONS, Chief Judge. The appeal presents an issue as to the application of the Fair Labor Standards Act to the

employees of a small loan office in Louisville, Kentucky, Title 29, Sections 201 et seq. The original Act by section 13 (a) (2) exempted from its operation "any employee engaged in a retail or service establishment the greater part of whose selling or servicing is in intrastate commerce * * *". Dissatisfaction having arisen with the administrative application of the judicially determined test of "consumer use" in deciding what was a "retail or service establishment," section 13 (a) (2) was amended in 1949 so that the exemption covers "any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located: A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry."

362 The question was presented to the District Court by the Secretary in the third of a series of three test cases by a petition for an injunction which, as granted, permanently enjoins the appellants from violating the Fair Labor Standards Act in their small loan establishment at Louisville. By this action, as in others elsewhere, the Secretary seeks a determination that a small loan establishment of the nature of the appellants is not exempted from the overtime provisions of the Act. There is no dispute as to the facts which by stipulation imported into the case evidence introduced in support of a petition in the first test case in *Pennsylvania* styled *Tobin v. Household Finance Corporation*, 106 F. Supp. 541, reversed by the Court of Appeals of the Third Circuit because the employees there involved were not engaged in commerce within the meaning of the Act and, therefore, not covered by it. *Mitchell v. Household Finance Corporation*, 208 F. (2d) 667.

The stipulated facts show that appellants operate a small loan business in Louisville, extending credit to individuals for payment of consumptive goods or services, that the individual accorded credit has consumed, or will consume, and in the purchase at a discount of conditional sales agreements evidencing the purchase of household appliances. Kentucky Finance Company, Inc., is a corporation which carries on the first phase of this operation and Kentucky Discount is a cor-

poration whose activity is in the second phase, though the employees of both corporations being engaged in each of these activities, conducted at one place of business. In the Discount activity, credit was generally extended to the purchaser of household appliances and not to the dealer, although the Discount company had recourse to the dealer in approximately 25% of its discount transactions. Ninety percent or more of the appellants' business was solely with Kentucky residents and in no case was resale contemplated or involved. It may confidently, therefore, be concluded that the two appellants constituted a single business unit engaged in the loaning of money to individuals for their use in paying for goods that they consumed and meets the requirements of the exemption amendment as doing business within the State.

At the outset, two issues were by the petition presented. One was whether the employees of the appellants were engaged in interstate commerce to such degree as called for the application of the Fair Labor Standards Act, or if so, whether their activities are recognized as retail sales or services in the particular industry.

Upon the appellants' concession that some of their employees are engaged in interstate commerce to such degree as to warrant the application of the Act, the first issue disappears and need be given no consideration. The sole question, therefore, on this appeal is whether the appellants are conducting a "retail or service establishment" within the meaning of the 1949 Amendment. In support of their contention, except witnesses from the financial industry gave evidence that appellants' business therein was recognized as a retail business. The District Judge accepted this evidence as proving an "ultimate fact." The Secretary of Labor, in response, produced evidence that the generally understood definition of "retail" had no application to the financial industry but there was no evidence on his behalf as to how the appellants' business was characterized in the financial industry itself. The District Court concluded that the appellants were not a retail or service establishment and granted the injunction sought. From this determination the case has been brought here for review.

The Secretary's three test cases are *Tobin v. Household Finance Corp.*, 106 F. Supp. 541, *Mitchell v. Aetna Finance Co.*, 144 F. Supp. 528, and the present case *Mitchell v. Kentucky Finance Co., Inc.*, 150 F. Supp. 368. In all three cases

in the District Court, the Secretary's contention was sustained. Prior to the present appeal, the Household Finance case, *supra*, was reversed by the Court of Appeals of the Third Circuit, *Mitchell v. Household Finance Corporation*, 208 F. (2d) 667. The Court there did not come to grips with the issue here involved, reversing on the ground that the employees therein concerned were not involved in interstate commerce. It does not, therefore, stand as a precedent to guide us in reaching decision. The Aetna Finance Company case, *supra*, reached the Court of Appeals of the First Circuit and was affirmed on substantially the same reasoning as that of the trial judge, 247 F. (2d) 190.

The Court of Appeals for the Fifth Circuit had no difficulty in determining that an establishment is retail if it answers to the three tests provided by the '49 Amendment. *Mitchell v. T. F. Taylor Fertilizer Works*, 233 F. (2d) 284. It followed its own decision in *Bousseau v. Mitchell*, 218 F. (2d) 734, wherein, it was said, in reference to the requirement that the sale of goods or services or of both, must be recognized in the particular industry as retail sales or services:

364 "Under this test any sale or service, regardless of the type of customer, will have to be treated by the Administrator and Courts as a retail sale or service so long as such sale or service is recognized in the particular industry as a retail sale or service."

In the Taylor case, *supra*, decided by a different panel of the Court of Appeals of the Fifth Circuit, Judge Tuttle pointed out that industry members were unanimous in their opinions on the question that sales of fertilizer to consuming farmers were recognized as retail in the fertilizer industry and offered a reasonable basis for their distinction which cannot be rejected because they were interested parties. He reasoned: "The fact that Congress referred the matter to industry recognition indicates that it intended a more flexible rule, adaptable to the many various branches of industry. In the determination of what is recognized as 'retail' in an industry, the opinion of industry members would be relevant, and the trial court did not err in basing its finding of fact upon their testimony." We find these cases highly persuasive in recognizing that the appellants' operations constituted a retail establishment. The evidence that it was so considered by the industry is cumulative, both in oral testimony of highly qualified ex-

perts in the financial industry and from the writings of those engaged in it. It is not in any measure refuted by those familiar with and active in the industry.

The language of the '49 Amendment is clear and unambiguous. It requires no interpretation by general observations made in respect to other industries or activities. The Congress in enacting the Fair Labor Standards Law was concerned with leaving primarily local activities within the control of the States. In enacting the '49 Amendment, it obviously avoided reliance solely on the minimum percentages of the amendment, nor mainly upon the resale qualification. In obvious caution it added the significant requirement of recognition by the industry itself. It is not controlling that the term "retail" may have in another environment and under other circumstances a different connotation. As has often been said, when considering the plain language of legislation, the Congress has created its own lexicon. It is within the capacity and function of legislative bodies so to do. Not only did it do so in the '49 Amendment but also in section 3 (k) of the Act, wherein it defined "sale" to include not only exchanges, con-

tracts to sell, consignment for sale, shipment for sale,
365 but added "or other disposition" and where in subsection (i) it defined "goods" as meaning not merely wares, products, commodities, or merchandise, but added "articles or subjects of commerce of any character." It would indeed be an anomaly if by the very intangibles by which an activity is brought within the scope of the commerce clause it should now be denied a clearly defined exemption.

While some of the legislative history of the amendment may suggest another purpose in derogation of the plain language of the amendment, such assumed purpose need not control. As was said by Mr. Justice Frankfurter, in 10 E. 40 St. Co. v. Callus, 323 U. S. 578, 583: "Dialectic inconsistencies do not weaken the validity of practical adjustments as between the State and Federal authority, when Congress has cast the duty of making them upon the courts." Even so, Senator Holland, in sponsoring the bill, stated that a retail establishment is to be "defined variably in various industries by determining what are the habits and practice in the industry. . . . The well settled habits of business must be applied. They will not necessarily be the same in all trades and businesses." 95 Cong. Rec. 12510, and Senator Taft commented: "Hardly an industry

can be found in which the question of what is retail and what is wholesale has not been settled for years. It is a question of fact just as much as any other question of fact." 95 Cong. Rec. 12516. Here, the facts of record speak for themselves.

Reversed with instruction to the District Court to set aside the injunction.

MILLER, dissenting. I am of the opinion that in view of the legislative history of the 1949 Amendment of the Fair Labor Standards Act, Section 213 (a) (2), Title 29, U. S. Code, as set out and discussed in *Tobin v. Household Finance Corp.*, 106 F. Supp. 541, E. D. Pa., and *Mitchell v. Aetna Finance Co.*, 144 F. Supp. 528, D. R. I., the judgment should be affirmed. *Steiner v. Mitchell*, 215 F. (2d) 171, C. A. 6th, affirmed, 350 U. S. 247.

366 [Clerk's certificate to foregoing transcript omitted in printing.]

367 Supreme Court of the United States

No. 161, October Term, 1958

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES
DEPARTMENT OF LABOR, PETITIONER

vs.

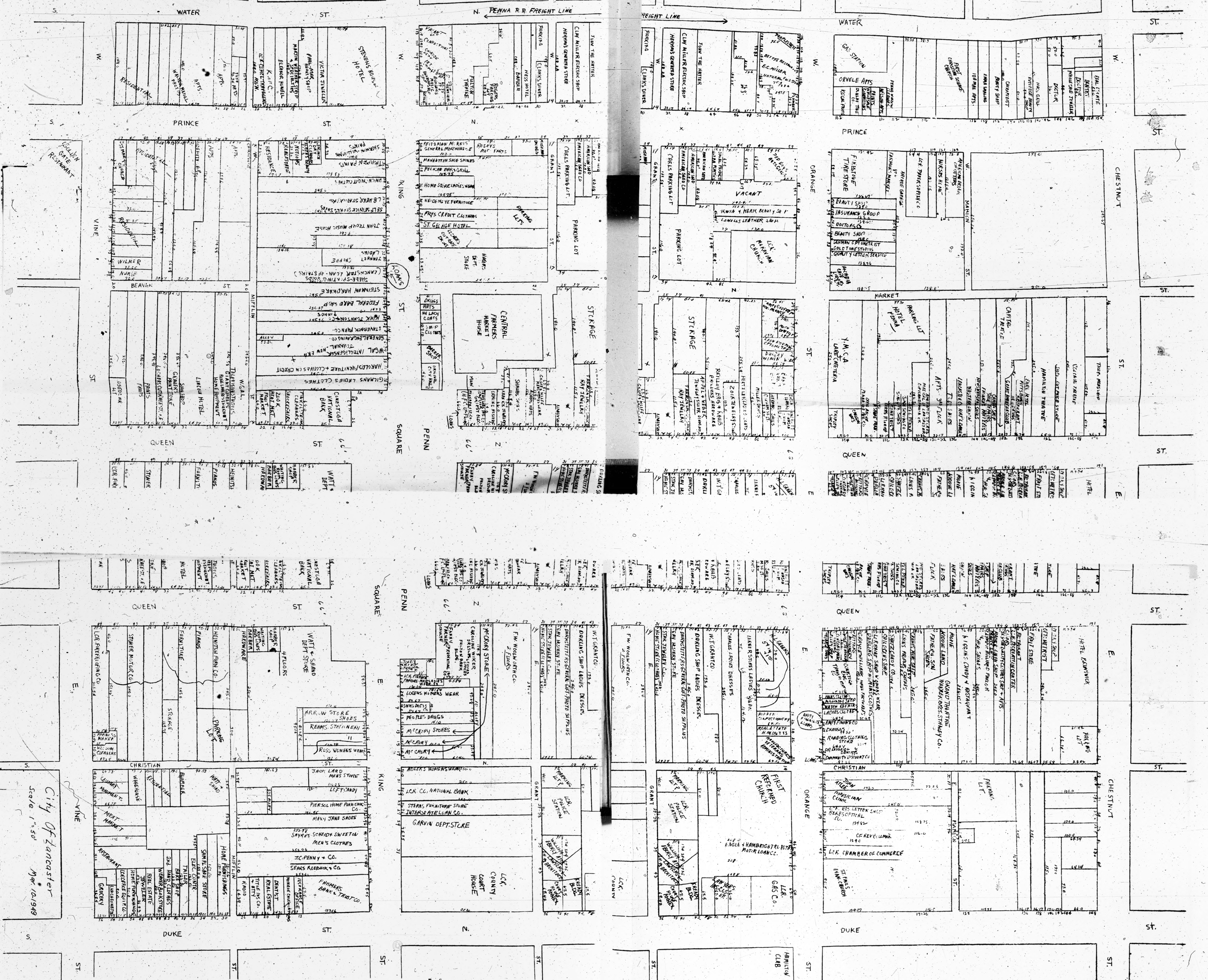
KENTUCKY FINANCE COMPANY, INC., AND KENTUCKY
DISCOUNT, INC.

Order allowing certiorari

October 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



City of Lancaster
Scale 1"=50'
Map 10.19.49

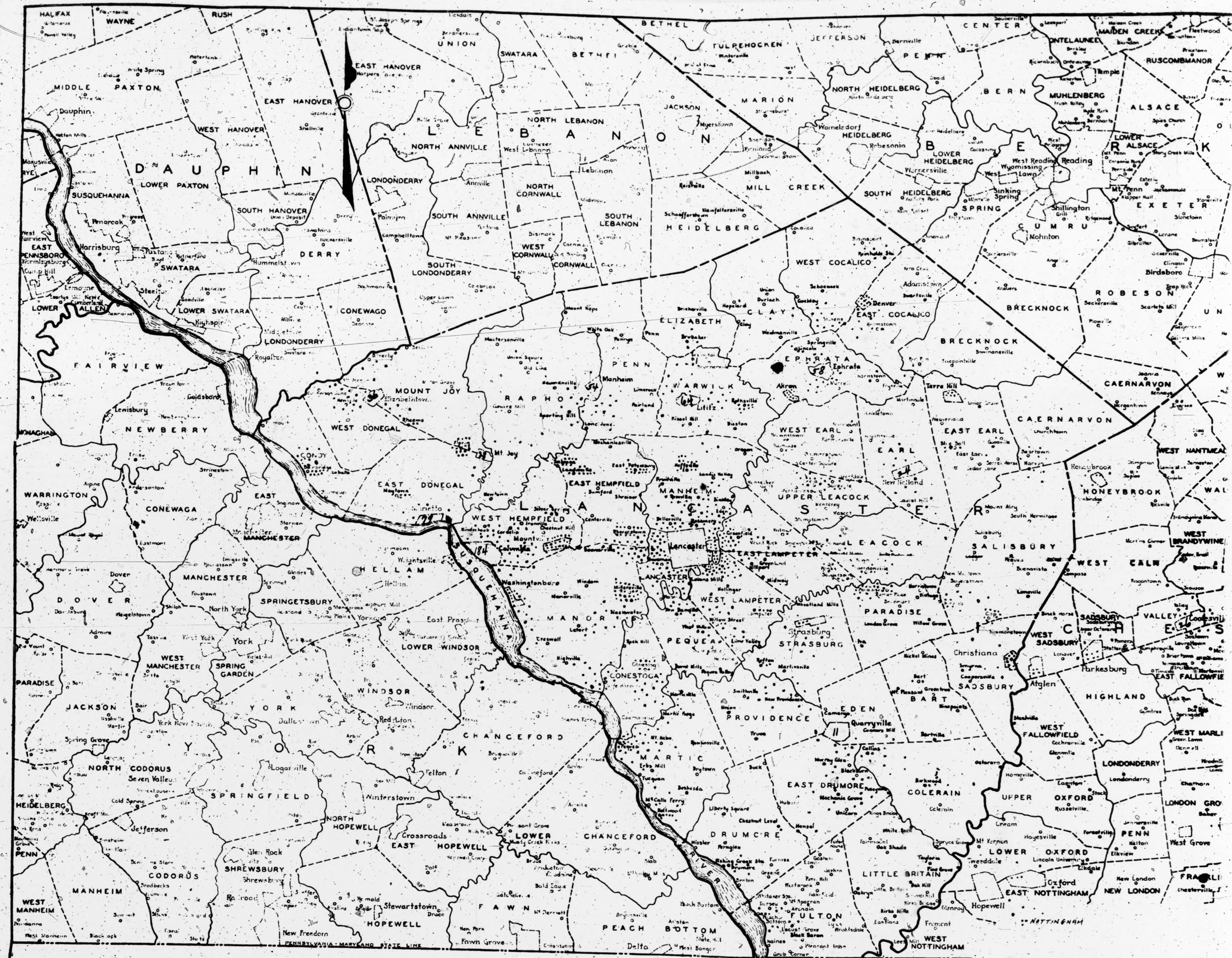
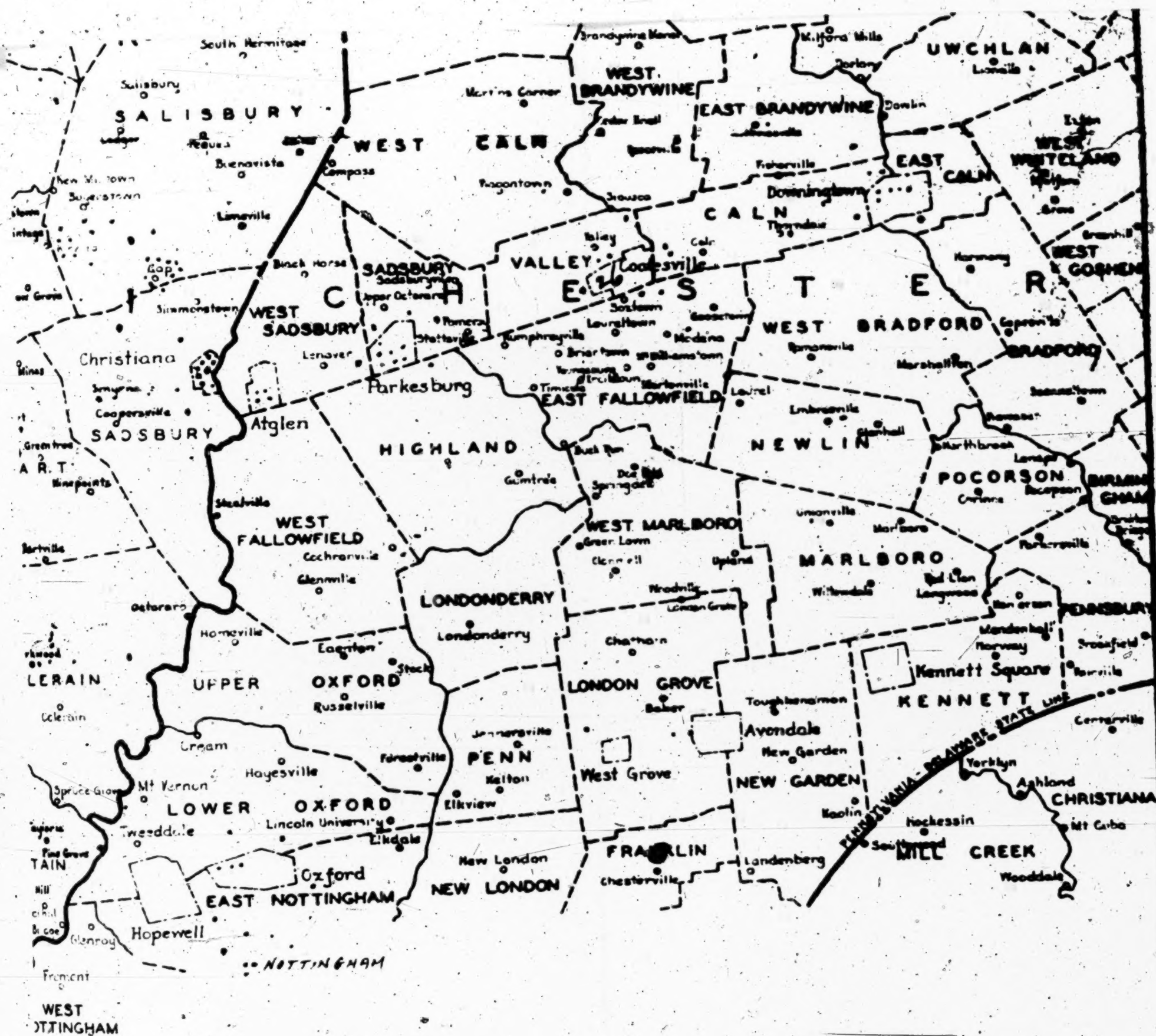


EXHIBIT D-8 (498 a)

NOTE: [B] [C] [D]
 THE RED DOTS INDICATE RESIDENCES OF THE
 OFFICE. PRESENT BORROWERS IN THE LANCASTER
 THERE ARE 124 AND NOT REFERRED BY ANY
 IN ADDITION THERE ARE 10 PRESENT BORROWERS
 PENNSYLVANIA, WHICH LOCALITIES ARE NOT ON
 WHO RESIDES IN THE STATE OF MARYLAND
 FIGURES SHOWN IN TOWN AREAS ON MAP ARE
 BASED ON THE 1940 CENSUS LIMITS

DRAWN BY []
 TRACED BY []
 CHECKED BY []



NOTE: [BILLE] 498 a) THE RED DOTS INDICATE RESIDENCES OF PRESENT BORROWERS FROM THE LANCASTER OFFICE. PRESENT BORROWERS IN THE LANCASTER MUNICIPAL AREA, AS SUCH, OF WHICH THERE ARE 1242 ARE NOT REFLECTED BY RED DOTS ON THE MAP. IN ADDITION THERE ARE 10 PRESENT BORROWERS RESIDING WITHIN THE STATE OF PENNSYLVANIA, WHICH LOCALITIES ARE NOT SHOWN ON THE MAP AND 1 BORROWER WHO RESIDES IN THE STATE OF MARYLAND. SCALE: 1 IN. = 3 MILES. FIGURES SHOWN IN TOWN AREAS ON MAP REPRESENT NUMBER OF PRESENT BORROWERS RESIDING IN THE CORPORATE LIMITS OF THAT TOWN. MAP PREPARED - DECEMBER 8, 1951

LLD-2758

No.

1617

In the Supreme Court of the United States

OCTOBER TERM, 1958

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR, *Petitioner*.

v.

KENTUCKY FINANCE COMPANY, INC.
AND KENTUCKY DISCOUNT, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

STUART ROTHMAN,
Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

SYLVIA S. ELLISON,
Attorney,
Department of Labor,
Washington 25, D. C.

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<i>Phillips, Inc. v. Walling</i> , 324 U.S. 490	9, 13
<i>Reynolds v. Salt River Valley Water Users Assn.</i> , 143 F.2d 863	15
<i>Schmidt v. Peoples Telephone Union of Maryville, Mo.</i> , 138 F.2d 13	15
<i>Steiner v. Mitchell</i> , 215 F.2d 171, affirmed, 350 U.S. 247	9, 13
<i>Sun Publishing Co. v. Walling</i> , 140 F.2d 445, certiorari denied, 322 U.S. 728	15
<i>Tobin v. Household Finance Corp.</i> , 106 F. Supp. 541, re- versed, 208 F.2d 667	4, 5, 10, 12

STATUTES:

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060,
as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201, *et seq.*);

Section 7(a)	8a
Section 13(a)	8a
Section 13(a)(2)	2, 4, 5, 9, 10, 14, 16
Section 13(a)(8)	16
Section 13(a)(9)	16
Section 13(a)(11)	16
Section 17	3

Kentucky Revised Statutes, Ch. 288	3
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MISCELLANEOUS:

95 Cong. Rec. 12505-12506	16
95 Cong. Rec. 12579	13
95 Cong. Rec. 14877	4
95 Cong. Rec. 14932	4
Federal Reserve Bulletin, published April, 1957	14
Moody's Bank and Financial Manual for 1956	15

In the Supreme Court of the United States

OCTOBER TERM, 1958

No.

**JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR, *Petitioner***

v.

**KENTUCKY FINANCE COMPANY, INC.
AND KENTUCKY DISCOUNT, INC.**

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this case on April 15, 1958.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (IR. 109a-112a)¹ are reported at 150 F.

¹ "R." references preceded by Roman numerals are to Volumes I, II, or III (as the case may be) of respondents' record appendix in the court below. "PR." references are to petitioner's appendix in the court below.

Supp. 368. The opinion of the Court of Appeals (App. A, *infra*, pp. 1a-7a) is reported at 254 F. 2d 8.

JURISDICTION

The judgment of the Court of Appeals was entered April 15, 1958 (App. A, *infra*, p. 7a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the business of making small loans on credit and purchasing accounts receivable (*i.e.*, conditional sales contracts) constitutes "sales of goods or services" by a "retail or service establishment" within the meaning of the exemption provided in Section 13(a)(2) of the Fair Labor Standards Act.

STATUTES INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201, *et seq.*), are set forth in Appendix B, *infra*, pp. 8a-9a. The provision particularly involved here is Section 13(a)(2) which reads as follows:

The provisions of sections 6 and 7 shall not apply with respect to * * * any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services

(or of both) is not for resale and is recognized as retail sales or services in the particular industry;

* * *

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin respondents from violating the overtime and record-keeping provisions of the Act with respect to office workers jointly employed by them in their small loan and discount business.

1. Respondents are affiliated corporations, having common corporate officers (IR. 9a), a common manager (IR. 35a), and a common office force consisting of nine full-time and two part-time employees (IR. 5a). They maintain a joint office in Louisville, Kentucky, where they are engaged in lending money on credit to borrowers, resident in Kentucky and Indiana (IR. 9a, 12a, 24a), at the maximum interest rate permitted by Kentucky's small loan act²; in selling these borrowers' protective life insurance (IR. 10a) which is issued by The Credit Life Insurance Company of Springfield, Ohio (IR. 51a); and in purchasing accounts receivable (conditional sales contracts) from appliance and furniture dealers (IR. 110a). As the trial court found, respondents' small loan business, conducted in the name of Kentucky Finance, accounts for approximately 60 percent of their gross dollar volume of business and the remaining 40 percent is derived from the discount phase of their business, which is handled by the Kentucky Discount affiliate (IR. 110a).

² These rates are 3½ percent per month on unpaid balances not exceeding \$150, and 2½ percent per month on any part thereof exceeding \$150 (Kentucky Revised Statutes, Ch. 288).

2. In a pre-trial stipulation, respondents admitted non-compliance with the Act's overtime and record-keeping provisions (IR. 7a). At the trial, it was conceded that their joint office employees were "engaged in commerce or in the production of goods for commerce" within the meaning of the Act and that an injunction should issue unless, as they contended, they are entitled to the amended "retail or service establishment" exemption provided in Section 13(a)(2) of the Act, *supra*, pp. 2-3 (IR. 22a). With the case in this posture, respondents endeavored to show that, in lending money and buying accounts receivable, they were making "sales of goods or services" and that such sales were "recognized as retail" in the industry. In addition, since the legislative history of this exemption indicated (by express statements in the reports of both the Senate and the House of Representatives) that the provision was not intended for such businesses as "banks, insurance companies, building and loan associations, [and] credit companies" (House Managers' Statement, 95 Cong. Rec. 14932; Senate Conferees' Report, 95 Cong. Rec. 14877), respondents also sought to show that the term "credit companies" does not include small loan companies. In support of these contentions, respondents offered the "expert" evidence of Dr. Morris R. Neifeld and similar evidence and exhibits used by Household Finance Corporation in *Tobin v. Household Finance Corp.*, 106 F. Supp. 541 (E.D. Pa.), reversed, 208 F. 2d 667 (C.A. 3), it having been stipulated that the evidence and exhibits in that case might be considered as evidence in this case (IR. 13a-14a).³ Dr. Neifeld, an economist, is

³ The reversal in *Household* was based solely on the ground that there was no employment in commerce within the meaning of the

Vice President and a director of Beneficial Management Corporation, the managing corporation of Beneficial Finance Company, a loan organization with 972 branch offices located in 44 states and in Canada and Hawaii (IR. 56a-58a). Respondents' other principal witness, Leon Henderson, testified in the *Household* case. His testimony was "based on his experience, commencing with his work with the Russell Sage Foundation, and the studies made in connection therewith" (respondents' brief below, p. 7).⁴

3. Although the Government believes it is clear that there are some types of businesses which are not eligible for the Section 13(a)(2) exemption regardless of the amount or kind of evidence that might be adduced, and that one of these is the money lending business, the Government took the precaution of presenting rebuttal evidence in *Household*; by stipulation, that evidence is also a part of the record in the instant case. It consists of the testimony of three economists who were well versed in the operation of the small loan business and the position it occupies in the financial industry and in the general organization of our economy. These witnesses all testified that loan companies are not "service establishments" within the generally

Act. Accordingly, the Third Circuit found it "unnecessary to go into the question whether the defendant is within the 'retail or service' exception to the statute" (208 F. 2d at 672), and left the District Court's ruling on that question undisturbed. In *Household*, unlike here, loans were not made to out-of-State borrowers and the coverage of the Act was vigorously contested, in addition to the exemption claimed under Section 13(a)(2).

⁴ The Russell Sage Foundation studies to which reference is made had to do with the "small loan problem" (IIIR. 257). As a result of those studies, the Foundation recommended passage of small loan legislation that would permit a maximum interest rate of 3.5 percent a month on loans under \$300.00 (IIIR. 259).

accepted meaning of the term." They are "engaged in the business of making loans or lending money, which has a different connotation" (PR. 10a). The concept of marketing is absent from loan transactions (PR. 20a, 23a, 24a). Money is not a "commodity" or "something you can consume" (PR. 24a). On the contrary, as respondents' own evidence shows, it is money that makes it possible to buy goods and services. "Only with [money] can food, clothing, shelter, recreation be secured" (Ex. D-5 (k), IIR. 291). Money "facilitates the exchange of goods" (Neifeld, IR. 99a). For this reason, financial institutions, including loan companies, are not listed under the "service" category in such publications as the "Standard Industrial Classification Manual" (a Government classification developed by a committee of experts so as to "conform to the structure of American industry and to general usage, to the attitudes of businessmen and government administrators in the field" (PR. 11a)). They are in a separate category—"finance, insurance and real estate" (PR. 11a-12a).

The Government's witnesses also testified that the retail-wholesale concept has no application to the financial industry, including the small loan business. The "classification is simply not relevant to the field

⁵ While the witnesses for Household and respondents' witness in this case testified that they looked upon the making of loans as a "service" function, they proceeded upon the theory that all economic endeavor constitutes either the sale of goods or services. Mr. Henderson expressly stated that he proceeded on this broad assumption (PR. 27a), and Household's other expert witnesses, Schmus and Dreibelbis, agreed generally with his testimony without indicating any different or more limited concept of the "service" category which they applied to the business of making loans (IIR. 145)—as did Dr. Neifeld, also, when he testified in the instant case (IR. 77a).

of finance" (PR. 13a). It applies to the mercantile field, and, as Household's own literature recognizes, "Merchandising and banking are two distinct businesses" (see *Financing the American Family*, Ex. D-5 (k), IIR. 275, at 301). As to the use of the terms "retail" and "wholesale" in such literature, the Government's witnesses stated that it was so used only by way of analogy.⁶ When some people refer to the "small loan field" as retail, they are saying that the small loan business "has certain problems which are analogous to those of the grocery store, * * *. But that is a very different thing from jumping to the conclusion that the small loan company is a retailing establishment in the same sense that a grocery store or any other retail establishment is" (PR. 14a-15a).

As to the general term "credit companies," the Government's witnesses testified that it would include personal loan or finance companies. Small loan companies are just as much credit companies "as is any other business that deals primarily in credit" (IIR. 168). Their

⁶ Although Dr. Neifeld disclaimed that the terms "retail" and "wholesale" are used in the small loan business in an analogous sense, his explanation of the use of such terminology by writers in the field was that "they generally do, especially when they are trying to justify, or explain rather is the word, why these small loans have to have a higher rate" (IIR. 76a-77a; emphasis added). That this is the reason the terms are used by the industry is clear from the literature in which they appear. See this material, most of which consists of institutional advertisements (IIR. 235-321; IIR. 126-137). See also the testimony of Mr. Henderson that in his work with the Russell Sage Foundation, which sponsored passage of small loan legislation, the "principal thing" that brought forward the idea of comparing small loan companies to retailers "was the discussion (if that is a strong enough word) of the need for a higher than the banking rate or the established usury law rate in the state"—i.e., it was part of the "argument" or "fortification" (PR. 25a).

testimony was corroborated by respondents' own witnesses in this case. While Dr. Neifeld stated that he had some difficulty with the term because "there is a specialized group known as commercial credit companies," he readily agreed, when the question was rephrased by substituting "institutions" for "companies," that the term would include personal loan companies (IR. 85a-86a).⁷

4. The District Court held here that "The lending of money does not constitute the sale of either goods or services within the intendment of the Section 13(a) (2) exemption", and denied the exemption (IR. 111a). Although it found that "local offices of small loan companies are regarded in the financial industry as retail service establishments," this finding was qualified by the preface: "Subject to the same qualifications expressed by Chief Judge Kirkpatrick in *Tobin v. Household Finance Corp.*, 106 F. Supp. 541 (D.C.E.D. Pa.), and Judge Day in *Mitchell v. Aetna Finance Company*, 144 F. Supp. 528 (D.C. R.I.)" (*ibid.*). These "qualifications," as Judge Kirkpatrick had explained, are that the expressions "service" and "retail" in the financial industry (in contrast to their usage in the "mercantile field" where "the classification has a practical value, because of differences in customary treatment of wholesale and retail sales of commodities") reflect simply the "very broad generic sense" and "overworked" usage of the terms, serving no special purpose and meaningless in the context of the

⁷ When this same witness testified in *Aetna Finance Co. v. Mitchell*, 247 F.2d 190 (C.A. 1), he stated that any financial institution "that furnishes credit as a service is a credit institution," including sales finance companies and personal finance companies. "They are all credit companies" (*Aetna Record*, p. 43; emphasis added).

Section 13(a)(2) exemption (106 F. Supp. at 544-545).

The Court of Appeals, with Judge Miller dissenting, reversed. Stating that the "language of the 49 Amendment is clear and unambiguous," the majority dismissed the Amendment's legislative history with the statement that "[w]hile some of the legislative history of the amendment may suggest another purpose in derogation of the plain language of the amendment, such assumed purpose need not control" (App. A, *infra*, pp. 5a-6a), and placed main reliance on the Fifth Circuit's opinion in *Mitchell v. T. F. Taylor Fertilizer Works*, 233 F. 2d 284 (App. A, *infra*, pp. 4a-5a).

REASONS FOR GRANTING THE WRIT

The decision below conflicts directly with the recent unanimous ruling of the Court of Appeals for the First Circuit in *Aetna Finance Co. v. Mitchell*, 247 F. 2d 190, as well as with the decisions of the district courts that have ruled on the issue. In ignoring the legislative history of the exemption in Section 13(a)(2) of the Fair Labor Standards Act, the opinion is also inconsistent with this Court's numerous holdings construing the Act in the light of its legislative history, particularly *Mitchell v. Bekins Van & Storage Co.*, 352 U.S. 1027, and *Steiner v. Mitchell*, 350 U.S. 247, as well as with the well-settled principle that any exemption from this Act must be "narrowly construed" and restricted to those "plainly and unmistakably within its terms and spirit" (*Phillips, Inc. v. Walling*, 324 U.S. 490, at 493). The issue presented would be of large importance even if it were limited to workers employed in the small loan industry, but it is greatly magnified by the implications of the opinion which

would enable many other industries heretofore unquestionably ineligible for the Section 13(a)(2) exemption to lay claim to it.

1. As appears from its face, the decision below is in direct conflict with the First Circuit's decision in *Aetna Finance Co. v. Mitchell*, 247 F. 2d 190,⁸ and with the decisions of the district courts that have ruled upon the status of small loan companies under the Fair Labor Standards Act's amended "retail or service establishment" exemption—i.e., in addition to the district court whose decision was reversed in the instant case, the district courts in the *Aetna Finance* case, *supra*, and in *Tobin v. Household Finance Corp.*, 106 F. Supp. 541 (E.D. Pa.), reversed on other grounds *sub nom. Mitchell v. Household Finance Corp.*, 208 F. 2d 667 (C.A. 3). All of these courts have held that the credit or money lending business is simply not the type of business to which the retail sales concept has any application, and hence that there is no occasion to consider the percentage or industry recognition tests prescribed in the Section 13(a)(2) exemption, as it was amended in 1949 (*supra*, pp. 2-3).⁹

In *Aetna Finance*, the company advanced precisely the same argument here accepted by the Sixth Cir-

⁸ The Sixth Circuit expressly noted (App. A, *infra*, p. 4a) that the trial court's decision in this case rested on substantially the same reasoning as the First Circuit's decision in *Aetna*.

⁹ As shown by its terms, the applicability of the exemption provided in Section 13(a)(2) depends, in the very first instance, upon whether the establishment is a "retail or service establishment" engaged in making "sales of goods or services (or of both)." Only after that has been affirmatively found can the percentage-of-sales tests come into play. Also, the provision requiring recognition of the sales or services "as retail sales * * * in the particular industry" applies only to establishments basically falling within the term "retail or service establishment." See *infra*, pp. 13-14, 15-16.

cuit—that the 1949 Amendments enacted a self-contained “unambiguous” and “entirely new and controlling” definition of “retail or service establishment” which made resort to legislative aids unnecessary (respondents’ brief below, p. 24). The First Circuit, apparently deeming this contention so tenuous as to require no comment, proceeded to examine the legislative history of the amended exemption and concluded that small loan companies were clearly outside the contemplated scope of this exemption. Not only was there no evidence of any legislative intent to include them, said the court, but the contrary intent was made “explicitly clear” by the statements of the sponsors and the committee reports “that the proposed amendment would do nothing to change the non-exempt status of ‘banks, insurance companies, *credit companies*, newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc.’ ” (247 F. 2d at 193; emphasis the court’s).

In answer to Aetna’s evidence and contentions on the “industry recognition” point (which were identical to the evidence and contentions of respondents below), the First Circuit pointed out that “the sponsors of the amendatory legislation repeatedly disavowed an intention to permit each industry to decide for itself whether it was conducting a ‘retail or service establishment’ within the meaning of the exemption” (*ibid.*). The evidence of Aetna’s “experts,” said the court, was simply “to the effect that, in the small loan industry, there was some disposition (in a more or less rough analogy borrowed from the mercantile field) to refer to small loans to individuals as ‘retail financing’ in contrast to ‘wholesale’ lending institutions which dealt with industry through either buying accounts

receivable or financing inventories" (247 F. 2d at 193).¹⁰ "Such usage," the court stated, "hardly has relevance to the intended meaning of the term 'service establishment' as used in § 13(a)(2)" (*ibid.*).

The trial court in the instant case also concluded that respondents' evidence on the percentage and recognition tests was "immaterial" (IR. 111a) for the reason, among others, that "The lending of money does not constitute the sale of either goods or services within the intendment of the Section 13(a)(2) exemption" (IR. 111a). Similarly, the District Court in *Household, supra*, stated: "The fact is that there are certain types of transactions which simply cannot be fitted into the category of performing services at retail and any attempt to do so" [by expert testimony that "every form of economic transaction resulting in gain to either party must necessarily be a sale or the performance of a service"] "creates an anomaly" (106 F. Supp. at 547).

¹⁰ As pointed out in the Statement, *supra*, p. 3, respondents' operations are not limited to the making of small loans but also include the buying of accounts receivable from appliance and furniture dealers. While Dr. Neifeld testified that the latter operations were also considered "retail" in the industry, his testimony in this regard is contradicted by the testimony of the *Household* witnesses given in connection with Household's contention that the general term "credit companies" does not include small loan companies. On this point, the *Household* witnesses stated that the term "credit companies" is not one "that is used in the banking fraternity" (IR. 141, 149) and vaguely suggested that it was used somewhere—perhaps colloquially—not to describe small loan companies, but "commercial" credit companies which they said are engaged in making "credit or loans available to business establishments" (IR. 141), "purchas[ing] accounts receivable," etc. (IR. 149; emphasis added). Because of respondents' extensive discount operations—which constitute 40 percent of their total business—the exemption is even more clearly inapplicable in the instant case than in *Aetna*.

2. In ignoring the legislative history of the 1949 Amendments, the court below is inconsistent, not only with this Court's decision in *Steineer v. Mitchell*, 350 U.S. 247, as indicated by Judge Miller in his dissent (App. A, *infra*, p. 7a), but with many other decisions in which the Court has construed the Act in the light of its legislative history. See, e.g., *Phillips, Inc. v. Walling*, 324 U.S. 490; *Mitchell v. Bekins Van & Storage Co.*, 352 U.S. 1027 (both of which deal with the Section 13(a)(2) exemption).

In *Bekins*, which is the only Section 13(a)(2) case to be considered by this Court since the 1949 Amendments, the respondent advanced the same broad interpretation adopted by the Sixth Circuit in the instant case and also relied heavily on the Fifth Circuit's decision in *Mitchell v. Taylor Fertilizer Works, Inc.*, 233 F. 2d 284. While *Bekins* did not deal with the precise aspect of the exemption presented in this case, respondent's contention there, as here, rested on the premise that "Section 13(a)(2) was amended in its entirety in 1949" and that the "new and specific tests provided by the amended section" were controlling (brief in opposition to petition for certiorari in *Bekins*, pp. 20-22). In rejecting respondent's contentions, this Court merely cited its pre-1949 decision in *Phillips, Inc. v. Walling*, *supra*, and made a reference to the specific parts of the legislative history (95 Cong. Rec. 12579) which plainly demonstrate the error of the general view adopted by respondents here, the respondent in *Bekins*, and the Fifth Circuit in *Taylor Fertilizer*.

As pointed out in our brief on the merits in *Bekins* (p. 26, fn. 9), although the *Taylor Fertilizer* decision was believed to be clearly erroneous, no petition for certiorari was filed "because the peculiar nature of

the fertilizer business and the special character of Taylor's operations [were] not thought to be sufficiently representative of the general problem presented by the new Section 13(a)(4)."¹¹ Also, it was thought that this Court's decision in *Bekins* might serve to resolve any problems arising from the erroneous *Taylor* opinion. However, not only has the Fifth Circuit adhered to and extended the basic rationale of *Taylor* (*Ben Kanowsky, Inc. v. Arnold*, 250 F. 2d 47, modified, 252 F. 2d 787, pending on petition for certiorari, No. 32-Misc., this Term),¹² but *Taylor's* far-reaching implications have been affirmed and so exemplified by the Sixth Circuit's decision in the instant case that the present need for further guidance from this Court is evident.

3. The importance of the issue presented, even if its impact were limited to employees of similar loan and sales finance companies, is shown by the large number of such companies and the even larger number of branch offices that they operate. According to a survey of the industry, made by the Federal Reserve System (published in the April, 1957, issue of the Federal Reserve Bulletin, pp. 392-400), there were 3,180 personal finance or small loan companies in the country as of June 30, 1955, and these companies operated a total of 8,830 branch offices. In addition, there were 2,620 sales finance or discount companies as of the same date, with nearly 6,000 branches. The total employment in the industry obviously runs into many

¹¹ As noted above (fn. 9, p. 10), the applicability of this exemption depends upon whether the establishment claiming it is a "retail or service establishment" within the meaning of Section 13(a)(2).

¹² The Government is filing a brief in support of this petition.

thousands. See Moody's Bank and Financial Manual for 1956, which shows a total in excess of 18,500 employees in the six largest companies.¹³

But the decision, resting as it does on the premise that every business rendering "service" in the broadest generic sense "is retail if it answers to the three tests provided by the '49 Amendment" (App. A, *infra*, p. 4a), has implications almost as far-reaching as the scope of the Fair Labor Standards Act itself. As appears from the First Circuit's *Aetna* decision, shortly after the Act was enacted a large number of businesses, including banks, building and loan associations, personal loan companies, newspapers, electric and gas utilities, etc., laid claim to the Section 13(a) (2) exemption, each asserting that it was engaged in rendering "service" (247 F. 2d at 192). Although it was settled by the early court decisions that the exemption was not so broadly intended but was limited to service establishments which have the ordinary characteristics of a retail establishment except that they sell services instead of goods, such as barber shops, beauty parlors, shoe-shine parlors, and the like (*Kirschbaum Co. v. Walling*, 316 U.S. 517, affirming *Fleming v. A. B. Kirschbaum Co.*, 124 F. 2d 567 (C.A. 3) and *Fleming v. Arsenal Bldg. Corp.*, 125 F. 2d 278 (C.A. 2); *Schmidt v. Peoples Telephone Union of Maryville, Mo.*, 138 F. 2d 13 (C.A. 8); *Reynolds v. Salt River Valley Water Users Ass'n.*, 143 F. 2d 863 (C.A. 9); *Sun Publishing Co. v. Walling*, 140 F. 2d 445 (C.A. 6), certiorari denied, 322 U.S. 728), the rationale of the decision below would allow

¹³ This included the organization of Dr. Neifeld (respondents' witness), Beneficial Finance, as well as Household Finance Corporation.

all "service" businesses to qualify for the exemption by adducing so-called "expert" testimony that their services "are recognized as retail in the particular industry."¹⁴

Not only does the decision below thus confuse and unsettle a large and important area of the Act's application which had previously been regarded as well settled, but it would, in every case in which the exemption is now claimed, impose upon the Administrator and the courts the complicated and expensive inquiry illustrated by the record in this case.

¹⁴ As noted in the Statement, *supra*, p. 4, both Houses expressly stated that the amendment to Section 13(a)(2) was not intended to exempt such businesses as "banks, insurance companies, building and loan associations, credit companies, newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc." Senator Holland, who sponsored the amendment in the Senate, pointed out that "these types of businesses are not considered exempt under the retail or service establishment exemption in the present law" and that "the proposed amendment would do nothing to change their nonexempt status" (95 Cong. Rec. 12505-12506). He also explained that "to the extent that Congress intended to exempt any of these businesses it created special exemptions for them" (referring to the special exemptions for small weekly and semi-weekly newspapers in Section 13(a)(8); for local trolleys and motor bus carriers in Section 13(a)(9); and for switchboard operators of small telephone exchanges in Section 13(a)(11)). *Ibid.*

Every reference in the legislative debates to the type of establishment to which the amended section would apply was in the same terms as described in *Kirschbaum* and the other decisions cited in the text, *supra*, p. 15. See these debates as compiled in Supplemental Appendix to the Brief of the Secretary of Labor in the *Actna* case, pp. 8, 13, 14, 20, 53, 63, 65, 66, 72 (copies of which are being filed with the Clerk). Note, too, that the *Kirschbaum* decision was expressly approved on the exemption point (Supplemental Appendix, pp. 10, 70).

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

SYLVIA S. ELLISON,
Attorney,
Department of Labor.

JULY 1958

1a
APPENDIX A

No. 13287

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**KENTUCKY FINANCE COMPANY, INC. and
KENTUCKY DISCOUNT, INC., *Appellants,***

v.

**JAMES P. MITCHELL, SECRETARY OF LABOR,
*Appellee.***

**APPEAL from the United States District Court
for the Western District of Kentucky.**

Decided April 15, 1958

**Before SIMONS, Chief Judge, ALLEN and MILLER,
Circuit Judges.**

SIMONS, Chief Judge. The appeal presents an issue as to the application of the Fair Labor Standards Act to the employees of a small loan office in Louisville, Kentucky, Title 29, Sections 201 et seq. The original Act by section 13 (a) (2) exempted from its operation "any employee engaged in a retail or service establishment the greater part of whose selling or servicing is in intrastate commerce. . . ." Dissatisfaction having arisen with the administrative application of the judicially determined test of "consumer use" in deciding what was a "retail or service establishment," section 13 (a) (2) was amended in 1949 so that the exemption covers "any employee employed by any retail or service establishment, more

than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry."

The question was presented to the District Court by the Secretary in the third of a series of three test cases by a petition for an injunction which, as granted, permanently enjoins the appellants from violating the Fair Labor Standards Act in their small loan establishment at Louisville. By this action, as in others elsewhere, the Secretary seeks a determination that a small loan establishment of the nature of the appellants is not exempted from the overtime provisions of the Act. There is no dispute as to the facts which by stipulation imported into the case evidence introduced in support of a petition in the first test case in Pennsylvania styled *Tobin v. Household Finance Corporation*, 106 F. Supp. 541, reversed by the Court of Appeals of the Third Circuit because the employees there involved were not engaged in commerce within the meaning of the Act and, therefore, not covered by it. *Mitchell v. Household Finance Corporation*, 208 F. (2d) 667.

The stipulated facts show that appellants operate a small loan business in Louisville, extending credit to individuals for payment of consumptive goods or services, that the individual accorded credit has consumed, or will consume, and in the purchase at a discount of conditional sales agreements evidencing the purchase of household appliances. Kentucky Finance Company, Inc. is a corporation which carries on the first phase of this operation and Kentucky Discount is a corporation whose activity is in the second phase, though the employees of both corpora-

tions being engaged in each of these activities, conducted at one place of business. In the Discount activity, credit was generally extended to the purchaser of household appliances and not to the dealer, although the Discount company had recourse to the dealer in approximately 25% of its discount transactions. Ninety percent or more of the appellants' business was solely with Kentucky residents and in no case was resale contemplated or involved. It may confidently, therefore, be concluded that the two appellants constituted a single business unit engaged in the loaning of money to individuals for their use in paying for goods that they consumed and meets the requirements of the exemption amendment as doing business within the State.

At the outset, two issues were by the petition presented. One was whether the employees of the appellants were engaged in interstate commerce to such degree as called for the application of the Fair Labor Standards Act or, if so, whether their activities are recognized as retail sales or services in the particular industry.

Upon the appellants' concession that some of their employees are engaged in interstate commerce to such degree as to warrant the application of the Act, the first issue disappears and need be given no consideration. The sole question, therefore, on this appeal is whether the appellants are conducting a "retail or service establishment" within the meaning of the 1949 Amendment. In support of their contention, expert witnesses from the financial industry gave evidence that appellants' business therein was recognized as a retail business. The District Judge accepted this evidence as proving an "ultimate fact." The Secretary of Labor, in response, produced evidence that the generally understood definition of "retail" had no application to the financial industry but there was no evidence on his behalf as to how the appellants'

business was characterized in the financial industry itself. The District Court concluded that the appellants were not a retail or service establishment and granted the injunction sought. From this determination the case has been brought here for review.

The Secretary's three test cases are *Tobin v. Household Finance Corp.*, 106 F. Supp. 541, *Mitchell v. Aetna Finance Co.*, 144 F. Supp. 528, and the present case *Mitchell v. Kentucky Finance Co., Inc.*, 150 F. Supp. 368. In all three cases in the District Court, the Secretary's contention was sustained. Prior to the present appeal, the *Household Finance* case, *supra*, was reversed by the Court of Appeals of the Third Circuit, *Mitchell v. Household Finance Corporation*, 208 F. (2d) 667. The Court there did not come to grips with the issue here involved, reversing on the ground that the employees therein concerned were not involved in interstate commerce. It does not, therefore, stand as a precedent to guide us in reaching decision. The *Aetna Finance Company* case, *supra*, reached the Court of Appeals of the First Circuit and was affirmed on substantially the same reasoning as that of the trial judge, 247 F. (2d) 190.

The Court of Appeals for the Fifth Circuit had no difficulty in determining that an establishment is retail if it answers to the three tests provided by the '49 Amendment. *Mitchell v. T. F. Taylor Fertilizer Works*, 233 F. (2d) 284. It followed its own decision in *Boissseau v. Mitchell*, 218 F. (2d) 734, wherein it was said, in reference to the requirement that the sale of goods or services, or of both, must be recognized in the particular industry as retail sales or services: "Under this test any sale or service, regardless of the type of customer, will have to be treated by the Administrator and Courts as a retail sale or service so long as such sale or service is recognized in the particular industry as a retail sale or service."

In the *Taylor* case, *supra*, decided by a different panel of the Court of Appeals of the Fifth Circuit, Judge Tuttle pointed out that industry members were unanimous in their opinions on the question that sales of fertilizer to consuming farmers were recognized as retail in the fertilizer industry and offered a reasonable basis for their distinction which cannot be rejected because they were interested parties. He reasoned: "The fact that Congress referred the matter to industry recognition indicates that it intended a more flexible rule, adaptable to the many various branches of industry. In the determination of what is recognized as 'retail' in an industry, the opinion of industry members would be relevant, and the trial court did not err in basing its finding of fact upon their testimony." We find these cases highly persuasive in recognizing that the appellants' operations constituted a retail establishment. The evidence that it was so considered by the industry is cumulative, both in oral testimony of highly qualified experts in the financial industry and from the writings of those engaged in it. It is not in any measure refuted by those familiar with and active in the industry.

The language of the '49 Amendment is clear and unambiguous. It requires no interpretation by general observations made in respect to other industries or activities. The Congress in enacting the Fair Labor Standards Law was concerned with leaving primarily local activities within the control of the States. In enacting the '49 Amendment, it obviously avoided reliance solely on the minimum percentages of the amendment, nor mainly upon the resale qualification. In obvious caution it added the significant requirement of recognition by the industry itself. It is not controlling that the term "retail" may have in another environment and under other circumstances a different connotation. As has often been said, when considering the plain language of legislation, the Congress has

created its own lexicon. It is within the capacity and function of legislative bodies so to do. Not only did it do so in the '49 Amendment but also in section 3 (k) of the Act, wherein it defined "sale" to include not only exchanges, contracts to sell, consignment for sale, shipment for sale, but added "or other disposition" and where in subsection (i) it defined "goods" as meaning not merely wares, products, commodities, or merchandise, but added "articles or subjects of commerce of any character." It would indeed be an anomaly if by the very intangibles by which an activity is brought within the scope of the commerce clause it should now be denied a clearly defined exemption.

While some of the legislative history of the amendment may suggest another purpose in derogation of the plain language of the amendment, such assumed purpose need not control. As was said by Mr. Justice Frankfurter, in *10 E. 40 St. Co. v. Callus*, 323 U. S. 578, 583: "Dialectic inconsistencies do not weaken the validity of practical adjustments as between the State and Federal authority, when Congress has cast the duty of making them upon the courts." Even so, Senator Holland, in sponsoring the bill, stated that a retail establishment is to be "defined variably in various industries by determining what are the habits and practice in the industry. . . . The well settled habits of business must be applied. They will not necessarily be the same in all trades or businesses." 95 Cong. Rec. 12510, and Senator Taft commented: "Hardly an industry can be found in which the question of what is retail and what is wholesale has not been settled for years. It is a question of fact just as much as any other question of fact." 95 Cong. Rec. 12516. Here, the facts of record speak for themselves.

Reversed with instruction to the District Court to set aside the injunction.

MILLER, dissenting. I am of the opinion that in view of the legislative history of the 1949 Amendment of the Fair Labor Standards Act, Section 213 (a) (2), Title 29, U. S. Code, as set out and discussed in *Tobin v. Household Finance Corp.*, 106 F. Supp. 541, E. D. Pa., and *Mitchell v. Aetna Finance Co.*, 144 F. Supp. 528, D. R. I., the judgment should be affirmed. *Steiner v. Mitchell*, 215 F (2d) 171, C. A. 6th, affirmed, 350 U. S. 247.

Judgment

(Filed April 15, 1958)

Appeal from the United States District Court for the Western District of Kentucky.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed, with instruction to the District Court to set aside the injunction.

APPENDIX B

The Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U. S. C. 201), provides in pertinent part:

~~SEC. 7~~ [63 Stat. 912-913]:

(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

SEC. 13 [63 Stat. 917]:

(a) The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; or (3) any employee employed by any establishment engaged in laundering, cleaning or repairing clothing or fabrics, more than 50 per centum of which establishment's annual dollar volume of sales of such services is made within the State in which the establishment is located: *Provided*, That 75 per centum of such establishment's annual dollar volume of sales of such services is made to customers who are not engaged in a mining, manufacturing, transporta-

tion, or communications business; or (4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided*, That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; * * *.

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JUL 24 1958

JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States

October Term, 1958

No. 161

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor,

Petitioner.

—v.—

KENTUCKY FINANCE COMPANY, INC.
and KENTUCKY DISCOUNT, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

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We believe that the decision below is clearly correct. It should be said, too, that the petition does not represent at all adequately either the arguments of respondents or the solid grounds sustaining the decision below. The opinion of the court below reflects a much less partisan view of the respondents' position.

For example, it has not been our position that the legislative history of Section 13(a)(2) has been, or should be, ignored (cf. Pet. 9, 10-11, 13). It has been shown, rather, that:

(1) It is clear from the legislative history that Congress intended to supply a definition of "retail or service establishment" which was to replace the

Administrator's previous definition and was to be controlling;

(2) while other items in the legislative history may appear to favor petitioner's position, the whole of this material, at most, points inconclusively in both directions; and

(3) the plain and unambiguous language of the statute, which should prevail over legislative comment of at least doubtful relevance, compels the conclusion reached by the court below.

It seems premature, however, to burden the Court with the details of this and other arguments sustaining the decision of the Court of Appeals. For we acknowledge that this decision conflicts with that of the First Circuit in *Aetna Finance Co. v. Mitchell*, 247 F. 2d 190. And we concede that the question presented is not an unimportant one.

In these circumstances, it seems sufficient to note that the granting of the writ is not opposed.

Respectfully submitted,

HAROLD H. LEVIN,
Attorney for Respondents.

July, 1958.

Office-Supreme Court, U.S.

FILED

JAN 7 1959

JAMES R. BROWNING, Clerk

No. 161

In the Supreme Court of the United States

OCTOBER TERM, 1958

**JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR, PETITIONER**

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DISCOUNT, INC.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT**

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 82-84) are reported at 150 F. Supp. 368. The opinion of the Court of Appeals (R. 356-361) is reported at 254 F. 2d 8.

JURISDICTION

The judgment of the Court of Appeals was entered April 15, 1958. The petition for a writ of certiorari was filed July 9, 1958, and was granted October 13, 1958 (R. 361). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the business of making small loans on credit and purchasing accounts receivable (*i. e.*, conditional sales contracts) constitutes "sales of * * * services" by a "retail or service establishment" within the meaning of the exemption provided in Section 13 (a) (2) of the Fair Labor Standards Act.

STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U. S. C. 201, *et seq.*), are set forth in the Appendix, *infra*, pp. 58-59. The provision particularly involved here is Section 13 (a) (2) which reads as follows:

The provisions of sections 6 and 7 shall not apply with respect to * * * any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; * * *.

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin respondents from violating the overtime and record-keeping provisions of the Act with respect to

office workers' jointly employed by them in their loan and discount business.

1. Respondents are affiliated corporations and wholly owned subsidiaries of Kentucky Finance Co., Inc., whose principal office is in Lexington, Kentucky (R. 7).¹ They have a common manager (R. 27) and use a common office force consisting of nine full-time and two part-time employees (R. 4). They maintain a joint office in Louisville, Kentucky, where they are engaged in lending money on credit to borrowers, resident in Kentucky and Indiana (R. 10; also, Fdg. 6, R. 82), at the maximum interest rate permitted by Kentucky's small loan act;² in selling these borrowers protective life insurance (R. 8) which is issued by The Credit Life Insurance Company of Springfield, Ohio (R. 39); and in purchasing accounts receivable (conditional sales contracts) from appliance and furniture dealers (R. 9; 29-37; Fdg. 4, R. 82). As the trial court found, respondents' small loan business accounts for approximately 60 percent of the gross dollar volume of their business, the remaining 40 percent being derived from the discount phase of their business (Fdg. 5, R. 82).

2. In a pre-trial stipulation, respondents admitted non-compliance with the Act's overtime and record-keeping provisions (R. 6). At the trial, they conceded that their joint office employees were "engaged

¹ Their exact corporate names are "Ky. Finance Co., Inc., No. 1, Louisville, Ky." and "Ky. Discount, Inc., Louisville, Ky." (Stip., par. 5, R. 7).

² These rates are $3\frac{1}{2}$ percent per month on unpaid balances not exceeding \$150, and $2\frac{1}{2}$ percent per month on any part thereof exceeding \$150 (Kentucky Revised Statutes, Ch. 288).

in commerce or in the production of goods for commerce" within the meaning of the Act, and that an injunction should issue unless, as they contended, they are entitled to the amended "retail or service establishment" exemption provided in Section 13 (a) (2) of the Act (R. 16-18; see also the opinion below, R. 358). With the case in this posture, respondents endeavored to show that, in lending money and buying accounts receivable, they were making "sales of * * * services" which were "recognized as retail" in the industry. In addition, since the legislative history of this exemption indicated (by express statements in the reports of both Houses of Congress) that the provision was not intended for such businesses as "banks, insurance companies, building and loan associations, [and] credit companies" (House Managers' Statement, 95 Cong. Rec. 14932; Senate Conferees' Report, 95 Cong. Rec. 14877), respondents also sought to show that the term "credit companies" does not include small loan companies. The bulk of the evidence in this voluminous record relates to these contentions.

Respondents' evidence consists of the "expert" testimony of Dr. Morris R. Neifeld and similar evidence and exhibits used by Household Finance Corporation in *Tobin v. Household Finance Corp.*, 106 F. Supp. 541 (E. D. Pa.), reversed, 208 F. 2d 667 (C. A. 3), rehearing denied, 208 F. 2d 672, it having been stipulated that the record in that case might be offered in evidence in the instant case (R. 13-14), and this

was done (R. 75-77).³ Dr. Neifeld, an economist, is Vice-President and a director of Beneficial Management Corporation, the managing corporation of Beneficial Finance Company, a nationwide chain of loan companies (see footnote 3, *supra*). Respondents' other principal witness, Leon Henderson, testified in the *Household* case. His testimony was "based on his experience, commencing with his work with the Russell Sage Foundation, and the studies made in connection therewith" (respondents' brief below, p. 7).⁴

³ The reversal in *Household* was based solely on the ground that there was no employment in commerce within the meaning of the Act. Accordingly, the Third Circuit found it "unnecessary to go into the question whether the defendant is within the 'retail or service' exception to the statute" (208 F. 2d at 672), and left the District Court's ruling on that question undisturbed. The Government's position on coverage, as well as on the exemption issue, was subsequently upheld in *Aetna Finance Co. v. Mitchell*, 247 F. 2d 190 (C. A. 1), affirming 144 F. Supp. 528.

Both *Household* and *Aetna* involved branch offices of large nationwide chain organizations. Although respondents in the instant case are not part of a nationwide chain organization, most of the small loan offices in the country are operated by such organizations. The six largest are Beneficial Finance Company, with 972 branches located in 44 states and in Canada and Hawaii (R. 42-44); Household Finance Corporation, with 738 branches in 35 states and Canada; Seaboard Finance Company, with 291 branches in 31 states; American Investment Company of Illinois, with 359 branches in 28 states; Family Finance Corporation, with 203 offices in 28 states; and Liberty Loan Corporation, with 110 offices in 13 states (see Moody's Bank and Financial Manual, 1956).

⁴ These studies had to do with the "small loan problem" (R. 257). As a result of them, the Russell Sage Foundation recommended passage of small loan legislation that would permit a maximum interest rate of 3.5 percent a month on loans under \$300.00.

3. Although the Government believes it is clear that there are some types of businesses which are not eligible for the Section 13 (a) (2) exemption regardless of the amount or kind of evidence that might be adduced, and that one of these is the money lending business, the Government took the precaution of presenting rebuttal evidence in *Household*; by stipulation, that evidence is also a part of the record in the instant case. It consists of the testimony of three economists, all well versed in the operation of the small loan business and the position it occupies in the financial industry and in the general organization of our economy:—Donald F. Blankertz, acknowledged by the defendants in the *Household Finance* case to be “one of the outstanding men” in the “field of marketing and retailing,” Associate Professor of Marketing at the Wharton School of Commerce and Finance, University of Pennsylvania, and a member of the Wholesale and Retail Trades Division, Office of Civilian Supply (R. 341); David C. Melnicoff who, as Head of the Department of Selective Credit Regulations of the Federal Reserve Bank of Philadelphia, administered regulations in the field of consumer credit, and made studies and reports with respect to small loan companies within the jurisdiction of the Philadelphia Board (R. 331-332); and Charles R. Whittlesey, Professor of Finance and Economics, Wharton School of Commerce and Finance, University of Pennsylvania, and Economist for the Penn Mutual Life Insurance Company, who was formerly an economist for the Fidelity-Philadelphia Trust

Company, and a member of the staff of the National Bureau of Economic Research (R. 160-161).

All of the Government's expert witnesses testified that the business of lending money is not recognized as "selling services"⁵ within the generally accepted business and economic use of that term in the field of marketing or retailing. They testified that, while "the word 'services' used in a very broad generic sense will apply to any economic endeavor in our economy, in our social system,"⁶ the small loan company is not a "service" establishment "within the generally accepted meaning of the word as it is used in the business community, in economic discussions, economic analyses and so on * * * that that term is reserved for other types of functions" and that "the financial industry as a group of establishments or businesses of related nature * * * is doing something else, something which can be more specific than that" (R.

⁵ Respondents have never contended that they make sales of "goods" within the meaning of the exemption. On the contrary, it was expressly stipulated in the *Household* record that this type of company is not engaged in sales of "goods" (R. 349).

⁶ This was the broad theory on which respondents' expert witnesses premised their opinion that the making of loans was a "service" function. Mr. Henderson expressly stated that he proceeded on this broad assumption (R. 350), and respondents' other expert witnesses in *Household*, Schmus and Dreibelbis, agreed generally with his testimony without indicating any different or more limited concept of the "service" category which they applied to the business of making loans (R. 145, 156)—as did Dr. Neifeld, also, when he testified in the instant case (R. 58). These witnesses, however, had considerable difficulty in describing a loan transaction as a "sale" of services. See *infra*, pp. 46-47.

333-334); that none of the standard authorities or trade publications recognize the "financial institutions * * * as being in the field of Marketing" or "as being properly a part of marketing or of retailing" (R. 343-344); and that the concept of marketing or selling relates to the transfer or use of commodities or of something the purchaser consumes—"money we do not regard as a commodity" or "something you can consume" as one can consume commodities or barber shop, beauty shop or restaurant "services" (R. 347). This testimony was corroborated by reference to the "Standard Industrial Classification Manual," a Government classification developed by a committee of experts so as to "conform to the structure of American industry and to general usage, to the attitudes of businessmen and government administrators in the field", which excluded financial institutions from its "service" classifications and placed them in the wholly separate category of "finance, insurance and real estate," and "[t]here is no designation of wholesale or retail within that" (R. 333-335).⁷

The Government's witnesses testified that the retail-

⁷ Respondents' witnesses would classify all businesses which they regard as performing services in the broad generic sense (whether within the "finance, insurance and real estate" category or some other category) to be "retail" when their "services" are for consumer use. See Mr. Henderson's testimony that telephone companies, "personal transportation" services (presumably taxicabs, airport limousines, railway passenger service, air passenger service, trolleys and bus companies), public utility companies, and insurance companies all perform retail services (R. 350-351). See also Dr. Neifeld's testimony that commercial banks and insurance companies also engage in retail operations (R. 48-50).

wholesale concept "is simply not relevant to the field of finance" (R. 337). It applies to the mercantile field, and, as Household's own literature recognizes, "Merchandising and banking are two distinct businesses" (Ex. D-5 (k), R. 275, at 301). As to the use of the terms "retail" and "wholesale" with respect to the financing field, the Government's witnesses stated these terms were not so used in the "traditional" or "official" sense, but only by way of rough analogy, *e.g.*, as a "useful" or "expository, pedagogic" substitute for "large" and "small", as "one might also speak of the wholesale loss of life in an earthquake, wholesale damage done by the recent storm" (R. 164-165, 168), or as "a figure of speech" in "illustrating or talking about a particular problem within the industry and not in the sense that the general public or the general business community would understand the word" (R. 341); or to illustrate that the small loan business "has certain problems which are analogous to those of the grocery store * * *. But that is a very different thing from jumping to the conclusion that the small loan company is a retailing establishment in the same sense that a grocery store or any other retail establishment is" (R. 338).

The distinction "between what is recognized traditionally, generally and officially—officially as shown by these classifications and the documents we have heard about, and popularly as well—to be retailing, and that which is perhaps capable of being construed ultimately or theoretically or in some supplementary or additional way as retailing" (R. 168), was

emphasized at several points (R. 162, 163, 164, 168). As one Government witness pointed out, the usage of the terms "wholesaling" and "retailing" in connection with financing "was obviously so untraditional * * * and unusual" that particular attention had to be called to such usage by qualifying clauses. (R. 162). Thus, in the literature relied upon by respondents, the terms were used in such qualified fashion as in *Household's* Ex. D-2 where it is said "[i]n one sense of the word, banks are wholesalers of credit, and companies engaged in making installment consumer loans are retailers of credit" (R. 162; emphasis added). Similarly, in an article published in the *Journal of Business*, the reference "[i]n the last analysis the specialized financial agency making small loans is doing a retail business" (R. 163; emphasis added).

Much of the evidence of respondents' witnesses Neifeld and Henderson confirms this very specialized analogous usage. Although Dr. Neifeld disclaimed that the terms "retail" and "wholesale" are used in the small loan business in an analogous sense, his explanation of the usage of such terminology by writers in the field was that "they generally do, especially when they are trying to justify, or explain rather is the word, why these small loans have to have a higher rate" (R. 58; emphasis added). That this is the reason the terms are used by the industry is clear from the literature in which they appear. See this material, most of which consists of institutional advertisements (R. 235-321; R. 126-137). And Mr. Henderson testified that, in his work with the Russell

Sage Foundation, the "principal thing" that brought forward the idea of comparing small loan companies to retailers. "was the discussion (if that is a strong enough word) of the need for a higher than the banking rate or the established usury law rate in the state"—i. e., it was part of the "argument" or "fortification" (R. 348-349). Mr. Henderson also stated that "[a]nother distinguishing feature, [between the banks and small loan companies] is the fact that the banks are really manufacturers of credit and sellers on a wholesale base, *if you want to push the analogy*" (R. 222; emphasis added).

As to the term "credit companies," the Government's witnesses testified that personal loan or finance companies are just as much credit companies "as is any other business that deals primarily in credit" (R. 168). Their testimony was corroborated by respondents' own witness. While Dr. Neifeld stated that he had some difficulty with the term because "there is a specialized group known as commercial credit companies," he readily agreed, when the question was rephrased by substituting "institutions" for "companies," that the term would include personal loan companies (R. 64-65).⁸

5. The District Court below concluded that "[t]he burden rests on the party asserting any exemption to establish that all requirements for the exemption

⁸ When this same witness testified in *Aetna Finance Co. v. Mitchell*, 247 F. 2d 190 (C. A. 1), he stated that any financial institution "that furnishes credit as a service is a credit institution," including sales finance companies and personal finance companies. "*They are all credit companies*" (*Aetna Record*, p. 43; emphasis added).

have been met" (R. 83), and that "[t]he lending of money does not constitute the sale of either goods or services within the intendment of the Section 13 (a) (2) exemption" (R. 84). In view of these conclusions, the trial court found it unnecessary to decide whether the discount phase of respondents' business would be sufficient to defeat the exemption (*ibid.*). Although it found that "local offices of small loan companies are regarded in the financial industry as retail service establishments," this finding was qualified by the preface: "Subject to the same qualifications expressed by Chief Judge Kirkpatrick in *Tobin v. Household Finance Corp.*, 106 F. Supp. 541 (D. C. E. D. Pa.), and Judge Day in *Mitchell v. Aetna Finance Company*, 144 F. Supp. 528 (D. C. R. I.)" (*id.*, p. 83). These "qualifications," as Judge Kirkpatrick had explained, are that the expressions "service" and "retail" in the financial industry (in contrast to their usage in the "mercantile field") reflect simply the "very broad generic sense" and "overworked" usage of the terms, not "anything more than an analogy borrowed from the mercantile field * * *" having no relevance in the context of the Section 13 (a) (2) exemption (106 F. Supp. at 544-545).

The Court of Appeals, with Judge Miller dissenting, reversed. The majority opinion stated that the "language of the '49 Amendment is clear and unambiguous," that it used terms which had been previously defined in the broad statutory definitions, and "[w]hile some of the legislative history of the amendment may suggest another purpose in deroga-

tion of the plain language of the amendment, such assumed purpose need not control" (R. 360); it placed main reliance on the Fifth Circuit's opinion in *Mitchell v. T. F. Taylor Fertilizer Works*, ~~233 F.~~ 2d 284 (R. 359). Circuit Judge Miller dissented (R. 361) "in view of the legislative history of the 1949 Amendment" citing the *Household Finance* and *Actna Finance* decisions, *supra*, pp. 4-5.

◇ SUMMARY OF ARGUMENT

A. The decision of the court below is premised upon the fallacious assumption that the "clear and unambiguous" statutory language of Section 13 (a) (2) of the Fair Labor Standards Act, as amended in 1949, so plainly applies to any and every establishment engaged in the "sales of goods or services", in the broadest generic sense of those terms, that resort to the legislative history to determine the meaning and intent of the amendatory language is unnecessary and unwarranted. Even if the statutory language conveyed such a "clear and unambiguous" meaning as the court below assumed, it is now too well-settled for argument that "the so-called 'plain meaning rule'" does not justify disregarding "explanatory legislative history no matter how 'clear the words may appear on superficial examination'" (*Harrison v. Northern Trust Co.*, 317 U. S. 476, 479; *Employees v. Westinghouse E. Corp.*, 348 U. S. 437, 444). In this case, the legislative history is controlling.

1. In the first place, the sponsors of the 1949 amendment explicitly asserted the legislative intent to "do

nothing to change" the previous "nonexempt status" of establishments such as "banks, insurance companies, *credit companies*, newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc." (95 Cong. Rec. 12505-12506, 14877, 14932; emphasis added). The mention of "*credit companies*" plainly has reference to personal finance or small loan companies ("whose sole function, in fact, is to lend money on credit," as the First Circuit noted in *Aetna Finance Co. v. Mitchell*, 247 F. 2d 190, 193 (C. A. 1)), as much as any other kind of credit company. Respondents' suggestion that the term "credit companies" refers only to "commercial" or "business" loan companies is, as the First Circuit ruled, "quite unconvincing" (*Aetna*, 247 F. 2d at 193), and is contradicted by the admission of respondents' own witness as well as by the frequency with which small loan companies describe themselves as "credit companies."

2. The sweeping assumption by the court below that the amended Section 13 (a) (2) completely changed and expanded the basic scope of the original exemption is not only directly contradicted by the above expressions of intent to leave unchanged the non-exempt status of the specified categories of businesses, but is clearly refuted by the rest of the legislative history. The repeated and emphatic general disavowals of any such expansive intent were amplified by specific explanations and illustrations confirming, beyond doubt, the purpose to limit the exemption to the basic types of establishments classified as typical "retail or service establishments" in the administrative and judicial interpretations prior to the 1949 amendment—estab-

lishments selling merchandise epitomized by the corner grocery, the drug store and the department store * * * (Phillips Co. v. Walling, 324 U. S. 490 at 497), and comparable service trades akin to these typical retail establishments except that they sell services instead of merchandise, such as "restaurants, barbershops, beautyparlors, funeral homes [and] shoe repair shops." See *Actna, supra*, 247 F. 2d at 192; Administrative Interpretative Bulletin No. 6, 1942 WH Manual 326, par. 24.

Our understanding of the history is, we believe, confirmed by this Court's decision in *Mitchell v. Bekins Van & Storage Co.*, 352 U.S. 1027, rejecting a claim to this exemption which rested on the same broad (but erroneous) assumption of the expansive effect of the 1949 amendment.

3. As uniformly explained in the legislative reports and by the sponsors, the limited purpose of the amendment, and the "only" substantial change intended, was to meet the problem "of the establishments which had previously been commonly recognized as retail" and were "traditionally regarded as retail," whose exempt status was "doubtful under the present exemption" by reason of the administrative application of the "business use" test in determining whether such establishments exceeded the "25 percent tolerance of nonretail activities" (95 Cong. Rec. 11003, 11116, 12492-12499, 12508).⁹ The principal

⁹ The "consumer-use" or "business-use" test has reference to the standard adopted by administrative interpretation, and approved by this Court in *Roland Electrical Co. v. Walling*, 326 U.S. 657, to distinguish typical retail sales from wholesale and other "non-retail" sales. The pre-1949 administrative interpretation pointed out that the type of establishment to which

sponsors in both Houses (Representative Lucas and Senator Holland) repeatedly assured the legislators: "It is *only* in the sense that it clarifies *such doubt* that my amendment can be regarded as expanding the present exemption" (95 Cong. Rec. 11116, 12506; emphasis added). As stated by Senator Holland, "that is the real milk in the coconut in our particular amendment," and is the "only substantial difference between the Administrator and his recommendation and the amendment which we propose * * *" (95 Cong. Rec. 12492-93, 12498, 12508).

This "doubt" had arisen only with respect to establishments in the marketing and distributing field and the comparable service trades—*i. e.*, the field in which the retail-wholesale concept was usually and commonly (as well as in official and economic usage) associated—

the exemption was limited "Typically * * * sells 'consumer' goods * * * to private persons to satisfy their personal wants," whereas it is "characteristic of wholesale establishments to exclude the general consuming public * * * and to confine their sales to other wholesalers, retailers, and large-scale industrial or business purchasers." Interpretative Bulletin No. 6, 1942 WH Man. 326, 329-330, pars. 11, 14. But, taking cognizance of the fact that an establishment with "the principal attributes of a retail [or service] establishment for purposes of section 13 (a) (2)" not infrequently "makes some nonretail sales," the administrative interpretation provided that "[m]inor discrepancies * * * will not defeat the exemption" and that such an establishment "nevertheless would be considered a retail establishment if the gross receipts from nonretail sales are not substantial in relation to the total gross receipts of the establishment," and that "[f]or purposes of enforcement the Administrator will ordinarily consider the nonretail selling of an establishment to be substantial if the gross receipts from such selling constitute more than one-quarter (25 percent) of the total gross receipts of the establishment." *Id.* at 331, 334, pars. 18, 28.

as distinguished from the separately classified fields of manufacturing, finance, real estate, public utilities etc. That the "doubt" was limited to the former narrow field is evident from the sponsors' explanations and specific illustrations of the problems for which the proposed amendment was designed (95 Cong. Rec. 12492-93, 12506; *Actua* Appx. 32-33, 73). There was no suggestion of any need for modification of the then existing administrative and judicial interpretations that this particular exemption was wholly inapplicable in the latter fields. On the contrary, not only was there repeated explicit approval of their exclusion from this exemption, but an express separate amendment was deemed necessary in order to grant an exemption to "retail" establishments engaged in manufacturing or processing some of the goods sold on the premises. Section 13 (a) (4). (See *infra*, pp. 33-34, fn. 23).

B. The statutory language of the amended exemption, far from plainly supporting the majority decision below, is on its face inapposite to the loan and discount business. The language "sales of goods or services" and an "annual dollar volume of sales" is certainly not descriptive of the business of lending money and discount purchasing of accounts receivable, without distorting the ordinary, commonly understood, meaning of these terms. Not even respondents themselves have espoused the position, taken by the court below, that this exemption provision must be read as incorporating the broad statutory definition of "goods" which was included in the original Act (obviously with reference to the coverage provisions then

in the Act). To so read the language of the amended exemption is not only "to pervert the process of interpretation by mechanically applying definitions in unintended contexts" (see *Farmers Irrigation Co. v. McComb*, 337 U. S. 755 at 764), but would be self-defeating so far as respondents' loan and discount business is concerned.

The patent confusion and unrealities encountered in any attempt to apply the statutory language to the loan business confirms the conclusion reached by all of the other courts that "the fact is that there are certain types of transactions which simply cannot be fitted" into the statutory language and that any attempt to do so simply "creates an anomaly" (see Judge Kirkpatrick in *Household*, 106 F. Supp. at 547). The answer is that, here, as in *Farmers Irrigation*, *supra*, "the legislative history confirms what a natural reading of the language of the * * * exemption would indicate," *viz.*, that the amended exemption used the terms "sales of goods or services" and "annual dollar volume of sales" in the same natural sense as they had been used in the administrative interpretation of the original exemption.

C. In any event, the trial court's conclusion that respondents failed "to establish that all requirements for the exemption have been met" (R. 83) undoubtedly reflects its appraisal of the conflicting "expert" evidence in this record. Since the exemption by its express terms presupposes that the establishment is engaged in making "sales of goods or of services (or of both)," a failure to prove this basic condition would alone be sufficient to support the trial court's

decision. The evidence of the Government's and respondents' expert witnesses was conflicting with respect to this basic condition as well as on the "industry recognition" issue posed by the last portion of the exemption (*supra*, p. 4 *ff.*; *infra*, pp. 50-54). The trial court's conclusion, therefore, that "the lending of money does not constitute the sale of either goods or services within the intendment of Section 13 (a) (2) exemption" (R. 84), although not labeled a "finding of fact," clearly represents the court's resolution of the conflicting expert evidence.

Moreover, the legislative history clearly establishes the inadequacy of the type of self-generated and self-serving evidence adduced by respondents, and specifically contradicts the Sixth Circuit's apparent assumption that "recognition *by* the industry itself" (R. 360, emphasis added) would suffice to satisfy the "industry recognition" test. As pointed out by the First Circuit in *Actua*, "the sponsors of the amendatory legislation repeatedly disavowed an intention to permit each industry to decide for itself whether it was conducting a retail or service establishment within the meaning of the exemption" (247 F.2d at 193).

Since virtually all of respondents' evidence relating to the "industry recognition" test was of this self-serving nature, and was contradicted not only by the administrative interpretation and judgment but also by objective well qualified experts and by standard Government reports and publications, the trial court below (and all of the other trial courts in similar cases) clearly evaluated this evidence correctly and according to the standards intended by Congress.

Certainly, at the very least, this appraisal of the evidence was not so clearly erroneous as to warrant reversal on appeal. On the contrary, we submit that the standard by which the Sixth Circuit appraised the evidence, ignoring the legislative intent, was clearly erroneous.

ARGUMENT

RESPONDENTS' LOAN AND DISCOUNT OFFICE IS NOT A "RETAIL" OR SERVICE ESTABLISHMENT" WITHIN THE MEANING OF SECTION 13 (a) (2) OF THE FAIR LABOR STANDARDS ACT, AS AMENDED IN 1949

Introduction

The decision below rests on the premise that Congress, in enacting the 1949 amendments to Section 13 (a) (2), *supra*, p. 2, abandoned the previous well-settled interpretation that the term "retail or service establishment" did not encompass every establishment engaged in selling goods or performing services in the broad generic sense,⁹ but was restricted to "small local retail establishments, epitomized by the corner grocery, the drug store and the department store" (*Phillips Co. v. Walling*, 324 U. S. 490, 497) and the type of "service" establishment "which has the ordinary characteristics of a retail establishment except that it sells services instead of goods" (*Fleming v. A. B. Kirschbaum Co.*, 124 F.2d 567, 572 (C. A. 3), affirmed, 316 U. S. 517), "comparable to 'barber shops, beauty parlors, shoe-shining parlors, clothes pressing clubs, laundries, automobile repair shops', or the like" (*Sun Publishing Co. v. Walling*, 140 F.2d 445,

448 (C. A. 6), certiorari denied, 322 U. S. 728).¹⁰ Ac-

¹⁰ It was well settled prior to the 1949 amendments that eligibility for the exemption as originally enacted (which simply read "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce", App., *infra*, p. 58, fn. 1) was restricted to the types of establishments as designated in the administrative interpretation. As noted in the First Circuit's *Aetna* opinion, 247 F. 2d 190, the consistent administrative interpretation had justifiably restricted this exemption to "service establishments deemed to be akin to retail establishments," such as "restaurants, barber-shops, beauty parlors, funeral homes, shoe repair shops," etc. whose "revenue is derived primarily from the sale of service instead of from the sale of merchandise" (see 247 F. 2d at 192), and that many dissimilar classes of establishments, although engaged in "service" in the "broad sense [that] every business performs service" were not within the contemplation of the term "retail or service establishment" as used in this exemption, listing among these non-exempt classes "banks * * * trust companies; building and loan associations; personal loan companies; insurance companies * * * newspapers; telephone companies; * * * electric and gas utilities; * * *" (Interpretative Bulletin No. 6, 1942 WH Manual 326, pars. 24-31; *Aetna* Appx. 3-6).

This restrictive interpretation received early and consistent judicial confirmation. See *Phillips Co. v. Walling*, *supra*, at 497; *Kirschbaum Co. v. Walling*, 316 U. S. 517, affirming *Fleming v. Arsenal Building Corp.*, 125 F. 2d 278 (C. A. 2), and *Fleming v. A. B. Kirschbaum Co.*, 124 F. 2d 567 (C. A. 3), adopting the administrative interpretation that "service establishment" as used in the exemption is limited to the type of establishment "which has the ordinary characteristics of a retail establishment except that it sells services instead of goods" (124 F. 2d at 572); *Roland Electrical Co. v. Walling*, 326 U. S. 657, 666, ruling that the term "service establishment" was not to be "read in a detached and broad sense" but as reaching "only such retail or service establishments as are comparable to the local merchant, corner grocer or filling station operator * * *"; *Sun Publishing Co. v. Walling*, *supra*, where the Court of Appeals which decided the instant case, after noting that in

cording to this reasoning, the 1949 amendments so changed and expanded the basic concept of "retail or service establishment," as used in the original exemption, that any and every kind of business establishment, even those engaged in enterprises such as finance, insurance, utilities, newspapers, etc., theretofore held outside the scope of and ineligible for the exemption, may now qualify through application of the percentage and "industry recognition" tests.

This broad interpretation of the amended exemption, as the court below itself seems to have recognized,¹¹ could be reached only by ignoring the "very legislative materials" which "refute [its] assumption." See *United States v. Dickerson*, 310 U. S. 554 at 562. Even if the statutory language conveyed such a "clear and unambiguous" meaning as the court below assumed (which, we submit, is far from clear, see *infra*, pp. 45-48), "the so-called 'plain meaning rule'" does not justify disregarding "explanatory legislative history no matter how 'clear the words may appear on superficial examination.'" (*Harrison v. Northern Trust Co.*, 317 U. S. 476, 479; *United States v. American Trucking Ass'ns.*, 310 U. S. 534, 543-544; *United States v. Dickerson*, 310 U. S. 554, 562; *Boston*

"the broader sense, every business is of service to the public," ruled that "as the term 'service' is used in the Act" it was limited as quoted in the text, *supra*. To the same effect, see *Schmidt v. Peoples Telephone Union of Maryville, Mo.*, 138 F. 2d 13 (C. A. 8); *Reynolds v. Salt River Valley Water Users Assn.*, 143 F. 2d 863 (C. A. 9).

¹¹ See the opinion below, R. 360: "While some of the legislative history of the amendment may suggest another purpose in derogation of the plain language of the amendment, such assumed purpose need not control."

Sand Co. v. United States, 278 U. S. 41, 48; *Employees v. Westinghouse Corp.*, 348 U. S. 437, 444). In construing the Fair Labor Standards Act, and specifically the exemption here in issue, this Court has repeatedly relied upon the legislative history. *Mitchell v. Bekins Van & Storage Co.*, 352 U. S. 1027; *Phillips Co. v. Walling*, 324 U. S. 490; see also *Steiner v. Mitchell*, 350 U. S. 247.¹²

That the pertinent legislative history here does not merely "suggest" (see opinion below, R. 360), but plainly discloses a contrary and much more limited meaning than that assumed by the court, is impressively evidenced by the marked unanimity of judicial opinion when that legislative history has been considered. Thus, the unanimous Court of Appeals for the First Circuit and the District Court in *Actna Finance Co. v. Mitchell*, 247 F. 2d 190 (C. A. 1), affirming, 144 F. Supp. 528 (D. R. I.), as well as the dissenting appellate judge and the District Court in the instant case (R. 82-84, 361), and the District Court in *Tobin v. Household Finance Corp.*, 106 F. Supp. 541 (E. D. Penn.),¹³ all, upon examination of

¹² The Sixth Circuit itself in its *Steiner* opinion recognized the appropriateness of "resort to the legislative history," quoting specifically this Court's statement [in *United States v. American Trucking Assn's.*, *supra*] that "there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'" (215 F. 2d 171 at 173).

¹³ Reversed on other grounds *sub nom. Mitchell v. Household Finance Corp.*, 208 F. 2d 667 (C. A. 3). The reversal was on the grounds that employees of the branch loan office there involved were not engaged in commerce within the meaning of the Act which made it "unnecessary to go into the question

the legislative history, reached a conclusion contrary to the decision below.

We shall show (A) that the legislative history unequivocally refutes the Sixth Circuit's interpretation of the 1949 amendatory language, (B) that the statutory language itself is inapposite to the loan and discount business and that, at the least, the applicability of the language is sufficiently doubtful to warrant reliance on the explanatory legislative history; and further (C) that, even if the statutory language could reasonably be construed as extending eligibility for exemption to loan companies, respondents' evidence falls short of proving that respondents' establishment meets the specified conditions for exemption.

A. THE LEGISLATIVE HISTORY REFUTES THE SIXTH CIRCUIT'S INTERPRETATION OF THE AMENDED EXEMPTION ¹⁴

As pointed out by the First Circuit in *Aetna* (247 F. 2d at 192-193), the legislative background and history of the amended exemption, far from indicating any intent to expand the basic categories of the eligible businesses, (1) "made it explicitly clear that

whether defendant is within the 'retail or service' exception to the statute" (208 F. 2d at 672). In the instant case, it was conceded that the employees are engaged in interstate commerce and therefore within the Act's coverage unless exempted by Section 13 (a) (2) (R. 17-18).

¹⁴ For purposes of convenience, the substance of the legislative history, which is quite voluminous, was compiled in a Supplemental Appendix to the Brief of the Secretary of Labor in the First Circuit *Aetna* case, *supra*, which was also submitted as an appendix to the Secretary's brief in the court below in the instant case; copies have been filed with the Clerk of this Court. References to this Appendix are cited as "*Aetna* Appx."

the proposed amendment would do nothing to change the non-exempt status" of the categories (including specifically loan and credit companies) previously classified by administrative and judicial interpretation as ineligible for the exemption, and (2) "unmistakably disclose" the much more limited intent, which was simply to relax the so-called "consumer-use test"¹⁵ so that the kinds of establishments theretofore recognized (and administratively classified) as eligible for the exemption, as originally enacted, might be allowed more leeway for "non-retail sales" without losing the exemption by reason of the administrative 25% "non-retail selling" tolerance standard. In short, the legislative history discloses that the amendment was intended essentially to codify the previous administrative interpretation except for its application of the 25% tolerance standard.

1. *The Legislative Purpose To Do Nothing To Change The Previous Non-exempt Status of "Credit Companies" Was Explicitly And Repeatedly Stated*

Unequivocal, and we submit decisive, evidence of legislative intent with respect to the precise issue here presented is the explicit statement repeatedly made in the legislative reports and by the sponsors of the amendment that "the amendment does not exempt banks, insurance companies, building and

¹⁵ On the "consumer-use test" and the "25 percent tolerance standard", see footnote 9, *supra*, pp. 15-16. See also *Interpretative Bulletin* No. 6, as revised and reissued June 16, 1941 (1942 W. H. Man. 326), pars. 28 and 29; *Aetna Appx.* 4-5).

loan associations, *credit companies*, newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc." (see House Managers Statement, 95 Cong. Rec. 14932, emphasis added; quoted in *Actna Appx. 8*).

The report of the Majority of the Senate Conferencees made virtually the same statement:

The conference agreement exempts establishments which are traditionally regarded as retail. * * * establishments which do not now have the exemption because the selling or servicing in which they are engaged is not considered to be retail (such as banks, insurance companies, credit companies, newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc.) will not become retail or service establishments under the provisions of the conference agreement. [95 Cong. Rec. 14877; quoted in *Actna Appx. 10*].

Again, when the specific question was raised on the floor of the Senate whether the proposed amendment would have the effect "of exempting banks, insurance companies, credit companies, * * * etc.," Senator Holland, the main sponsor of the amendment in the Senate, answered with an unqualified "No," pointing out that "*these types of businesses are not considered exempt under the retail or service establishment exemption in the present law*" and that "*the proposed amendment would do nothing to change their non-exempt status*" (95 Cong. Rec. 12505-12506; *Actna Appx. 70-71*; emphasis added).

Respondents have attempted to escape this clear

expression of legislative intent by suggesting that Congress did not use the term "credit companies" in its broad sense but in some esoteric sense which would not include personal finance companies (see the Statement, *supra*, p. 11). The First Circuit's dismissal of this suggestion as "quite unconvincing" (*Actna*, 247 F. 2d at 193) is amply sustained by the admission of respondents' own witness that personal loan companies are "credit institutions" (see the Statement, *supra*, p. 11), as well as by the frequency with which small loan companies describe themselves as "credit companies." Thus, in the latest annual Roster of Consumer Finance Companies in the United States, at least 359 such establishments describe themselves in their trade names as "credit companies."¹⁶ It may also be noted that the company which writes protective life insurance on Kentucky's Finance's borrowers calls itself the *Credit Life Insurance Company*.¹⁷

¹⁶ This roster is published by the National Consumer Finance Association (the trade association of which Kentucky Finance is a member) from information supplied by the State supervising officials operating under the Uniform Small Loan Laws.

¹⁷ Even the restricted usage which loan company witnesses claimed for the term "credit companies" (*viz.*, "commercial" credit companies making "credit or loans available to business establishments," "purchas[ing] accounts receivable," etc., R. 141, 149) would clearly include the discount phase of respondents' business which consists of buying installment sales contracts. The purchasing of such accounts receivable constitutes 40 percent of respondents' total business. Therefore, regardless of whether personal loan companies are also "credit companies," the exemption would be inapplicable to respondents' business (see the further discussion in text, *infra*, pp. 54-55).

2. *The Broad Assumption That The 1949 Amendment Changed and Expanded the Basic Types of Establishments to Which the Exemption Had Previously Been Restricted Is Also Contradicted by the Legislative History*

The premise of the decision below is that the 1949 amendment had the effect of making any and all businesses—including banks, insurance companies, newspapers, public utilities, as well as credit companies—eligible for this exemption. This is, also, the basic premise of respondents' claim to the exemption. As respondents' principal witness frankly explained, the classification of loan companies as "retail or service" establishments depends on the theory that *all* economic endeavor constitutes either the sale of goods or services—he "couldn't recall anything that was not goods or service," or (as clarified by counsel) "in the economy of this country you can have transactions in either goods or service or nothing else" (R. 213-214)—and "from that standpoint," "the public utility company * * * insurance companies, banks and so on," as well as credit companies are "selling services" (R. 213-214, 219, 350-351).¹⁸ Respondents' witnesses also

¹⁸ It may be noted that respondents have not taken the position of the court below that lending money constitutes the "selling" of "goods"—i. e., "disposition" of "articles or subjects of commerce" within the literal terms of the Act's "own lexicon" (see Point B, *infra*, pp. 45-48 for discussion of this ruling). The express stipulation in the *Household* case that the small loan company is *not* engaged in the sale of "goods" (R. 352) apparently recognized that the terms of this exemption were used in their more natural, ordinary sense. Cf. *Farmers Irrigation Co. v. McComb*, 337 U. S. 755, 764, discussed *infra*, pp. 45-48.

admitted that the standard on which they relied to classify loans as "retail"—viz. "making loans to the individual or the family to meet consumer needs" as distinguished from "making loans to business or industry for business purposes" (R. 124-125)—would apply equally to classifying telephone service (to individuals), personal transportation service, residential gas and electric service, and sales of insurance policies to individuals, as "retail" service (R. 350-351).

In other words, respondents' claim to exemption and the decision below are premised on the sweeping assumption that the 1949 amendments enacted an "entirely new and controlling" definition of "retail or service establishment" (see respondents' brief below, p. 24) which would make every establishment within the Act's general coverage eligible to claim the exemption. This would impose on the Administrator and the courts the burdensome and complicated task of applying the new "industry recognition" test of the exemption (*supra*, pp. 2, 4, 22) not only to the numerous establishments in the various classes previously recognized as eligible but to establishments in the wide variety of business categories to which the term "retail or service establishment" had theretofore been considered wholly inapplicable (see *supra*, p. 21, fn. 10). According to this reasoning, no kind of business establishment can be excluded from the exemption without such an extensive inquiry.¹⁹

¹⁹ The record in this case well illustrates how burdensome and expensive this task is, involving unavoidably a "battle of the experts".

This broad, unlimited, interpretation of the 1949 amendment is not only directly contradicted by the above-quoted explicit expressions of intent to leave unchanged the non-exempt status of specified categories of business (*supra*, pp. 25-26), but is refuted by other observations about the amendment in the legislative reports and during the extensive debates. The principal sponsors in both Houses (Representative Lucas and Senator Holland) repeatedly and emphatically asserted that the amended exemption was limited to "establishments which are traditionally regarded as retail" and "which had previously been commonly recognized as retail" (e. g. 95 Cong. Rec. 11116, 12499, 12506, 14877; *Actna* Appx. 10, 22, 51, 73), and "in a real sense it is not expanding the exemption at all but simply confirming it for those establishments which the Congress always intended to exempt" (95 Cong. Rec. 11116, 12506; *Actna* Appx. 23, 73). These general assertions and disavowals were amplified by specific illustrations and explanations confirming that the basic types of establishments with which the amended exemption was concerned were the same as those previously classified as "typical examples" of "retail or service establishments" by the prior administrative and judicial interpretations, and that there was no intent to make the exemption available to whole new categories of businesses.

Every reference to the types of establishments regarded as affected by the amended exemption (and the legislative reports and debates are replete with

references²⁰) invariably mentioned only businesses in the same classifications as the "typical examples" contained in the administrative interpretation prior to the 1949 amendments and in this Court's opinion in *Phillips Co. v. Walling*, 324 U. S. 490—establishments selling merchandise "epitomized by the corner grocery, the drug store and the department store * * *" (324 U. S. at 497) and comparable service trades akin to these typical retail establishments except that they sell services instead of merchandise, such as restaurants, hotels, garages, barber shops, beauty parlors and funeral homes. See *supra*, pp. 15-16, 20-22, and Administrative Interpretative Bulletin No. 6, *supra*, p. 21, fn. 10. Compare the types of establishments named by the sponsors as those to which their amendment would apply: "the grocery stores, the hardware stores, the clothing stores, the dry goods stores, restaurants, hotels, stationery stores, farm-implement dealers, automobile dealers, coal dealers, paint stores, furniture stores, and lumber dealers" (95 Cong. Rec. A5231-32, 11003-11004, 11199, 11203, 12502; *Aetna* Appx. 12-13, 16, 20-21, 24-27, 63). And contrast the explicit acceptance of the non-exempt classification of "banks, insurance companies, credit companies, newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc." (*supra*, pp. 25-26), which obviously paraphrased the substance of the prior administrative in-

20 See e. g., 95 Cong. Rec. A5231-32, 11001, 11003-4, 12499, 12502-03, 12505, 12515; *Aetna* Appx. 8, 13, 14, 20, 53, 63, 65, 66, 72, 95.

terpretation (see Interpretative Bulletin, par. 29; *Aetna* Appx. 4).²¹

While the sponsors criticised extensively the administrative and judicial application of the so-called "business-use" test (see footnote 9, *supra*, pp. 15-16) to typical establishments "traditionally regarded as retail," the legislative history is devoid of any criticism of the basic classifications of eligible and ineligible businesses contained in these prior administrative and judicial interpretations. On the contrary, every reference to these classifications paraphrased the substance of the prior administrative interpretation and evidenced full acceptance of this aspect of the prior rulings.²²

²¹ See also the explicit approval of this Court's rulings that the exemption was inapplicable to the businesses involved in the *Kirschbain* and *Roland Electrical* cases, *infra*, pp. 41-42.

²² Moreover, since the Administrator's interpretations in this respect were not changed, Section 16 (c) of the 1949 amending Act itself ratified the non-exempt status of the "personal loan companies," *inter alia*. Section 16 (c) expressly provided that "Any order, regulation or interpretation of the Administrator * * * in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect * * * except to the extent that any such order, regulation, interpretation * * * may be inconsistent with the provisions of this Act * * *." (Emphasis added.) The administrative interpretation specifically listing "personal loan companies" among the types of establishments not considered eligible for the exemption [Interpretative Bulletin, "Retail and Service Establishment and Related Exemptions," 1942 W. H. Man. 334-335; 1944-45 W. H. Man. 454; later incorporated in 29 C. F. R. 1958 Supp., 779.40] was unquestionably "in effect * * * on the effective date of this [1949] Act." See *Steiner v. Mitchell*, 350 U. S. 247, 255; *Manéja v. Waialua Agricultural Co.*, 349 U. S. 254; *Alstate Construction Co. v. Durkin*, 345 U. S. 13, 16-17.

It follows that, in the absence of any evidence that Congress

This legislative history is, we believe, confirmed by this Court's decision in *Mitchell v. Bekins Van & Storage Co.*, 352 U. S. 1027. While *Bekins* did not deal with the precise aspect of the amended exemption involved in this case, respondent's contention there (that five separate warehouses could be regarded as a single establishment for purposes of applying the tests of the amended exemption) rested, as here, on the broad assumption that the amended Section 13 (a) (2) had completely changed and expanded the basic scope of the original exemption. In rejecting *Bekins'* contentions, this Court, in its brief *per curiam* opinion, relied upon the pre-1949 decision in *Phillips Co. v. Walling, supra*, and referred to the specific parts of the legislative history (95 Cong. Rec. 12579) which plainly demonstrate the error of the broad assumption made by the respondent in *Bekins* and the court below in the instant case.²³

intended to change the administrative interpretation on the inapplicability of the retail establishment exemption to personal loan companies, that interpretation remains in effect by express legislative mandate.

²³ The same broad assumption was at the bottom of the Fifth Circuit's erroneous decision in *Mitchell v. T. F. Taylor Fertilizer Works, Inc.*, 233 F. 2d 284. *Taylor* involved the Section 13 (a) (4) exemption, newly added by the 1949 amendments (see App., *infra*, pp. 58-59), which, by express terms, extends the 13 (a) (2) exemption to "an establishment which qualifies as an exempt retail establishment under clause (2). * * * notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells. * * *." It may be noted that this special provision, which as its sponsors (Senator George and Representative Lucas) explained, was limited to the "small retailers, who are strictly retailers" but who produce or process some of the products which they sell, and was not intended to permit "manufacturing establishments, as such" to qualify for

3. *The Limited Purpose of the Amendment, and its Only Substantial Change, Was a Clarification of the Doubt Arising Out of the Application of the "Consumers-Use" Test To Disqualify, Under the 25 Percent Non-Retail Tolerance Standard, the Types of Establishments Traditionally Regarded As Retail*

As uniformly explained in the legislative reports and by the sponsors, the "only" substantial change intended by the 1949 amendment was to meet the problem "of the establishments which had previously been commonly recognized as retail" and were "traditionally regarded as retail," whose exempt status was

the exemption (95 Cong. Rec. 11216, 12579; see also *id.* 14942) would not have been needed if the terms of Section 13 (a) (2) had been used in the broad generic sense assumed by the court below and by respondents in the instant case, since the producing or processing operations would not have prevented such "retailers" from qualifying under Section 13 (a) (2), if thus broadly construed.

As pointed out in our petition for certiorari in the present case (pp. 13-14), although the *Taylor Fertilizer* decision was believed to be clearly erroneous, no petition for certiorari was filed because the peculiar nature of the fertilizer business and the special character of Taylor's operations were not thought to be sufficiently representative of the general problem presented by the new Section 13 (a) (4), the applicability of which depends upon whether the establishment claiming it is a "retail or service establishment" within the meaning of Section 13 (a) (2). Also, it was thought that this Court's decision in *Bekins* might serve to resolve any problems arising from the erroneous *Taylor* opinion. However, not only has the Fifth Circuit adhered to and extended the basic rationale of *Taylor*, (*Ben Kanawsky, Inc. v. Arnold*, 250 F. 2d 47, modified, 252 F. 2d 787, pending on petition for certiorari, No. 32 Misc., this Term) (in which the Government has filed a supporting brief), but *Taylor's* far-reaching implications have been affirmed and exemplified by the Sixth Circuit's decision in the instant case.

"doubtful under the present exemption" by reason of the administrative application of the "business use" test (see footnote 9, *supra*, p. 15) in determining whether such establishments exceeded the "25 percent tolerance of nonretail activities" (95 Cong. Rec. 11003, 11116, 12492-12499, 12508). The principal sponsors in both Houses (Representative Lucas and Senator Holland) repeatedly assured the legislators: "It is *only* in the sense that it clarifies *such doubt* that my amendment can be regarded as expanding the present exemption" (95 Cong. Rec. 11116, 12506; emphasis added).

The need for some amendment to this exemption, as both Representative Lucas and Senator Holland pointed out (95 Cong. Rec. 11002, 12492; *Actua Appx.* 14, 32), had been recognized by the Administrator who had recommended the proposed amendment included in the original Lesinski bill (H. R. 5856).²⁴

²⁴ The Lesinski proposal was:

"SEC. 13. (a) The provisions of sections 6, 7 and 12 shall not apply with respect to * * * (2) any employee of a retail or service establishment whose employer had a total annual volume of sales or servicing of not more than \$500,000 during the preceding calendar year. An establishment shall not be deemed a retail or service establishment within the meaning of this subsection if more than 25 per centum of its annual dollar volume during the preceding calendar year was derived from activities other than retail selling or servicing. As used in this subsection, 'retail selling or servicing' means selling or servicing to private individuals for personal or family consumption, or selling or servicing (but not for resale) where (1) the goods sold or serviced do not differ materially either in type or quantity from goods normally sold or serviced for such personal or family consumption, or where (2) the customer is a farmer and the goods sold or serviced are of types and in quantities used by the ordinary farmer in his farming operations."

The Lesinski proposal (which was in substance the Administrator's recommendation) plainly contained no suggestion of any need for clarification or modification of the basic categories of businesses to which the then-existing administrative and judicial interpretations had restricted the exemption's applicability. The "doubt" which this proposal was designed to clarify related solely to the problem that the "consumers-use" (as distinguished from "business use") test could operate to disqualify particular establishments *in these basic eligible categories*, under the 25 percent "non-retail" tolerance standard. The legislative history demonstrates that the Lucas amendment, which was substituted for the Lesinski proposal, was designed simply to "clarify" (to be sure, not in the "identical" manner) this same doubt "in the precise field" which the Administrator had "urged Congress to clarify" (see 95 Cong. Rec. 12492-93, 12506, 12508; *Actua Appx.* 32-33; 72-73). This is evident from the detailed tabular comparison made by Congressman Lucas of his amendment with the "present law" and with the Lesinski proposal, as well as from his and Senator Holland's explanations and specific illustrations of the problems for which the proposed amendment was designed.

Thus, in Congressman Lucas' tabular comparison, the only doubt in the "present law" mentioned was the doubt arising out of the administrative application of the "business use" test enunciated "in the *Roland Electrical Company case* (326 U. S. 657)." ²⁵

²⁵ As pointed out *infra*, pp. 41-42, the objection to the *Roland Electrical* decision was limited to the implications of its reasoning; its actual *holding* was expressly approved.

As described by him, the Lesinski proposal: "It denies the exemption to many large groups of retailers. This is done by denying the exemption to any retail or service establishment which sells more than 25 percent of its goods or services to customers who buy for business or nonpersonal, or nonfamily uses * * *. The effect would be to write into the law expressly the rule laid down by the Supreme Court in the *Roland Electrical Co. case* * * * that no sale is retail if made to a purchaser for a business use" (95 Cong. Rec. A5231-32; *Actna* Appx. 12-13). In contrast, Mr. Lucas described his own proposal as eliminating this "discriminatory limitation on the exemption found in the Lesinski bill," but retaining the "25 percent tolerance of nonretail activities"—"the same as the tolerance presently allowed by the Administrator and also proposed in the Lesinski bill"—"since almost any retail or service establishment does some selling which is not strictly regarded as retail, such as selling to purchasers who buy to resell" (*ibid.*). The main difference between the Lucas and Lesinski proposals was in the scope of the definition of nonretail sales *by retail establishments*; Congressman Lucas desired a broader definition than had previously been used.

In explaining the amendment on the floor of the House, Congressman Lucas again centered attention on the "doubt" created by the *Roland Electrical* case which, he reiterated, "gave rise to the view that many, perhaps most, of the establishments which *had previously been commonly recognized as retail* are not embraced within the exemption so written into the law" (95 Cong. Rec. 11003; emphasis added; *Actna* Appx. 16). "Since practically every retail or service

establishment makes some such sales, this means," he said, "that the status of all retail and service establishments is doubtful under the present exemption."

Answering specifically the criticism that his proposed amendment would expand "the present retail and service establishment exemption," he continued:

My amendment clears up that doubt by exempting the establishments which are traditionally regarded as retail. It is only in the sense that it clarifies such doubt that my amendment can be regarded as expanding the present exemption. But in a real sense it is not expanding the exemption at all but simply confirming it for those establishments which the Congress always intended to exempt. [95 Cong. Rec. 11116, emphasis added; Aetna Appx. 22-23].

Senator Holland, the main sponsor in the Senate, was even more emphatic and specific regarding the limited purpose and effect of the amendment. After observing that the Administrator himself had recognized "the doubt which surrounds the meaning of the present retail and service establishment exemptions, and has urged Congress to clarify such doubt," Senator Holland continued:

*Mr. President, that is the real milk in the coconut in our particular amendment. It will be found upon reading the recommendations for changes as made by the Administrator of the Wage and Hour Act that he himself recommends a change. * * * I think it is proper at this time to say that that it is the nub of this controversy, because the Administrator himself has in so many words, and at considerable length, insisted that changes be made in the law,*

and he has recommended to the Congress that amendments be made [Emphasis added: 95 Cong. Rec. 12492-12493; *Actua Appx.* 32-33].

Senator Holland made it clear that "the doubt" to which he referred, and which prompted the "only" substantial change that would result from the amendment, was, "the doubt [which] arose because the Administrator and the courts, including the United States Supreme Court [in the *Roland Electrical* case, 326 U. S. 657²⁶] ruled that the sale of goods and services for business use, as distinguished from family or household use, was not retail" (95 Cong. Rec. 12492, 12495, 12496, 12498, 12499; *Actua Appx.* 32, 36-40, 45-55). And he repeatedly asserted that the proposed amendment was, in substance, confined solely to that problem. Quoting from the Administrator's recommendation for "incorporation in the act of specific language similar to that used in the tests applied by the divisions in determining the eligibility of an establishment for the exemption" and that "the basic test, in determining whether a sale is a retail sale is the purpose of the buyer" (95 Cong. Rec. 12494; *Actua Appx.* 34, 35), Senator Holland stated that "[o]ur amendment is confined to their effort [the effort of the "dry goods stores," the "small hotel" proprietor, the "merchants and the service people"] to get away from that kind of interpretation" (95 Cong. Rec. 12495, emphasis added; *Actua Appx.* 36).

He asserted and reasserted that:

The only substantial difference between the Administrator and his recommendation and the

²⁶ See Senator Holland's explicit approval of the *Roland Electrical* holding, quoted *infra*, p. 42.

amendment which we propose is that we propose to do away with this artificial distinction between a retail sale on the one hand and a business sale on the other, which, regardless of the size, and regardless of the fact that it is intrastate, can never be held to be a retail sale under the regulations or under the interpretative rulings of the Administrator. [95 Cong. Rec. 12498; *Actual Appx.* 46-47].²⁷

*Again, after disclaiming that the "proposed amendment would exempt any more employees than the present retail exemption," except "only in the sense that it clarifies such doubt", (repeating virtually verbatim the above quoted statement of Representative Lucas, *supra*, p. 38; 95 Cong. Rec. 12506; *Actual Appx.* 72-73), Senator Holland added this explanation of the limited differences between the Administrator's recommendations and those of the proposed amendment:

Let it be perfectly clear that I am not saying that his recommendations are identical with those of the sponsors of this amendment, but several times in the course of my remarks I have said that he recognizes the necessity for action *in the precise field to which this amendment applies*, and that he recognizes the necessity for the adoption of some of the provisions of this amendment, because he requests the adoption of an amendment which will follow the

²⁷ Ironically enough, the basic test on which respondents here rely to claim the exemption is the very test which the amendment proposed "to do away with," *i. e.*, the distinction between "consumer" and "business" use (R. 124-125, 350-351; see *supra*, p. 29).

practice which has been laid down in the rulings he has made heretofore in this field.

Furthermore, I have pointed out that *there is only one area of substantial difference between the Administrator's recommendations and the provisions of this amendment, and that difference has to do with the artificial distinction the Administrator makes between business sales of any kind and retail sales.* Under his ruling, no business sale can be classified as a retail sale. [Emphasis added; 95 Cong. Rec. 12508; *Actua Appx.* 74].

This "doubt" had arisen only with respect to establishments in the marketing and distributing field and the comparable service trades—*i. e.*, the field in which the retail-wholesale concept was usually and commonly (as well as in official and economic usage) associated—as distinguished from the separately classified fields of manufacturing, finance, real estate, public utilities, etc.

That the problem to which the sponsors referred was limited to the former narrow field in which the Administrator had applied the 25 percent tolerance standard, and had no reference to the non-exempt classification of the other fields or categories of businesses, is confirmed by the explicit legislative approval of the *holding* of the *Roland Electrical* decision (as distinguished from the implications of its reasoning) and of the non-exempt holding in *Kirschbaum v. Walling*, 316 U. S. 517. Thus, the Report of the Majority of Senate Conferees, after stating that the amendment would not change the non-exempt status of "banks, insurance companies, credit companies * * * etc.,"

added: "Nor does the conference agreement change the status of * * * establishments selling industrial goods and services to manufacturers engaged in the production of goods for interstate commerce and to other industrial and business customers (such as the establishment held nonexempt in *Roland Electric Co. v. Wabing* * * *) or of firms renting or maintaining loft or office buildings (such as those held nonexempt in *Kirschbaum* * * *;" (95 Cong. Rec. 14877; *Aetna* Appx. 10). See also Senator Holland's explicit "Definitely not" answer to specific questions whether the *Roland Electrical Co.* or *Kirschbaum* cases would "be decided any differently under the proposed amendment?" He explained his negative answer on the ground that the kind of businesses in which those establishments were engaged "are wholly unrelated to the concept of retail selling or servicing" (95 Cong. Rec. 13505; *Aetna* Appx. 69-70).

In other words, the criticism of the *Roland Electrical* decision was confined to the application of its rationale in determining whether the types of establishments "traditionally regarded as retail" lost the exemption by reason of exceeding the 25 percent non-retail tolerance standard. Together with the repeated explicit approval of the administrative classification of other non-exempt businesses, this history shows unmistakably that the amendment was designed to apply only in the same "precise field" (see *supra*,

p. 40) in which the Administrator had previously applied the concepts of "retail" and "non-retail" selling or servicing.²⁸

²⁸ Senator Holland was very explicit about this (95 Cong. Rec. 12505; *Aetna* Appx. 71-72) :

Q. Do many retail and service establishments engage in some wholesale or nonretail transactions?

A. Yes. The Administrator recognizes this under his present interpretations which permit a retail or service establishment to devote 25 percent of its business to wholesale or nonretail selling or servicing without losing the exemption.

Q. What tolerance or allowance for wholesale or non-retail selling or servicing is provided for in the proposed amendment?

A. Twenty-five percent. The same as the Administrator allows under the present law. See the Administrator's 1948 Annual Report to Congress, page 119. Under paragraph (2) of the proposed amendment the 25-percent tolerance would be for transactions not recognized in the particular industry as retail selling or servicing such as sales for resale and quantity sales at a discount. As to laundries and cleaning establishments a 25-percent tolerance is provided for their sales of services to industrial customers.

Q. What type of service establishments would the proposed amendment exempt?

A. Generally, restaurants, hotels, repair garages, watch-repair establishments, beauty parlors, barber shops, hospitals, farm equipment repair shops, laundries, dry-cleaning establishments, valet shops, battery shops, refrigerator repair shops, typewriter repair shops, taxicab companies, exterminator service companies and other establishments performing local services. [Emphasis added.]

Even Senator Taft, who felt that the amendment did and should change the prior administrative interpretations more extensively than the majority Senate Conferees interpreted it, stated that he "felt very strongly that we were not in any way extending the exemption. We are simply reaffirming the position the Senate has taken heretofore. I am inclined to agree with the Senator in the view that there is no reason to make exemptions, though a few have been made, that were not exemptions under the original law" (95 Cong. Rec. 12516; *Actua Appx.* 98-99).²⁹ As summed up by Senator Taft, "everyone knew" what kind of "retail establishment" the exemption related to (95 Cong. Rec. 12515; *Actua Appx.* 95):

What is a retail establishment? I think everyone knew what a retail establishment was, and there were included in the list those who sold automobiles one by one, those who sold farm machinery to farmers. Retail stores of all kinds, hardware stores, the ordinary laundry, all but the most exceptional laundry, in the minds of all of us are retail establishments. Those are the establishments Congress intended to exempt. * * * ³⁰

²⁹ The excerpt quoted by the court below (R. 360-361) from Senator Taft's comments cannot be properly evaluated in isolation from its context in the legislative discussion. Even if intended to convey the sweeping implications inferred by the court, its persuasive value would be counteracted by the fact that Senator Taft's interpretation represented the minority interpretation of the conferees' agreement.

³⁰ It is significant that, in the legislative debates on the amendment, the estimates of the number of additional employees who would be deprived of protection by the amendment ranged from 25,000 to 200,000 (95 Cong. Rec. 12506, 12511,

B. THE STATUTORY LANGUAGE OF THE AMENDED EXEMPTION IS, ON ITS FACE, INAPPOSITE TO THE LOAN AND DISCOUNT BUSINESS.

By its terms, Section 13 (a) (2), as amended (*supra*, p. 2), can be applied only to establishments engaged in making "sales of goods or services (or of both)" and which have an "annual dollar volume of sales." Respondents' business, which consists of lending money, purchasing conditional sales contracts, and taking applications for protective life insurance policies, can hardly be described as selling goods or services without distorting the natural, commonly understood, meaning of that language. As noted above, *supra*, p. 28, fn. 18, respondents have not espoused the position, taken by the court below, that this language must be read as incorporating the broad statutory definition of "goods" which was included in the original Act (obviously with reference to the coverage provisions then in the Act). To so read the language of the amended exemption is not only "to pervert the process of interpretation by mechanically applying definitions in unintended context" (see *Farmers Irrigation Co. v. McComb*, 337 U. S. 755 at 764),³¹ but would be self-defeating so far as respond-

12515, 12517; *Aetna* Appx. 72, 77-78, 94-95, 99-101). If wholly new categories of businesses had been contemplated (such as banks, gas and electric utilities, credit and loan companies, newspapers, telephone companies, etc.), the estimates would have run into the several more hundred thousands or into the millions.

³¹ In the *Farmers Irrigation* case, this Court rejected the contention that the definition of "production" in Section 3 (j) of the Act should be applied to the word "production" as used in the agriculture exemption, stating that "the legislative history confirms what a natural reading of the language of the

ents' loan and discount business is concerned. For if loan and discount transactions are "sales of goods or services" because the statutory definitions include "exchange * * * or other disposition" (Section 3 (k)) of "articles or subjects of commerce" (Section 3 (i)),³² such "sales" are equally "sales for resale" (for re-"exchange" or re-"disposition").³³

At best, the amendatory language as applied to such a business is full of ambiguities, whether read as including the statutory definitions or not. This was well illustrated by the obvious confusion of respondents' expert witnesses, when confronted with such questions as, for example, what is "the annual dollar volume of sales of a personal finance company," and "what exactly is being sold to the customer when the loan is made" and "whether anyone ever speaks of reselling credit" (R. 351, 353-354; Household Record, Vol. II, pp. 241a-242a).³⁴

agricultural exemption would indicate—the word production was not there used in the artificial and special sense in which it was defined in § 3 (j)" (337 U. S. at 764).

³² Sections 3 (k) and (i) are printed in full in the Appendix, *infra*, p. 59.

³³ The borrowers are clearly not the ultimate consumers of the money as are customers who purchase groceries, drugs, furniture, etc.; they borrow for the very purpose of redistribution or exchange for other goods or services. Nor does the borrower consume the lending "service" as a customer does the services of a barber shop, beauty shop, hotel or restaurant. Moreover, since 40 percent of respondents' business is derived from discount purchases of accounts receivable from dealers, they could not meet the 75 percent test, since at least this discount business is for resale (redistribution) by the dealers from whom the accounts are purchased. See *infra*, pp. 54-55.

³⁴ Respondents' agreed to the stipulation that a small loan company is not engaged in sales of "goods" (see the State-

The patent confusion and unrealities encountered in any attempt to apply the statutory language to the loan business confirms the conclusion reached by all of the other courts that "The fact is that there are certain types of transactions which simply cannot be fitted" into the statutory language and that any attempt to do so simply "creates an anomaly" (see Judge Kirkpatrick in *Household*, 106 F. Supp. at 547). The answer is that, here, as in *Farmers Irrigation, supra*, "the legislative history confirms what a natural reading of the language of the * * * exemption would indicate"—that the amended exemption used the terms "sales of goods or services" and "annual dollar volume of sales" in the same natural sense as they had been used in the administrative interpretation of the original exemption, *i. e.*, as applied

ment, *supra*, p. 4). Their claim is that the lending of money is "selling services" in the broadest economic sense of those terms. Their witness Leon Henderson admitted some difficulty over the use of the word "sale," stating to the court: "I am somewhat cautious, Your Honor, on this matter of the word 'sale' because I spoke of these salary buyers, and we always looked at a transaction as not being a sale * * *;" only on the theory that "everything in business or industry has to be the sale of a service or the sale of goods," could he say that the lending of money would be a sale of services (R. 349-350). Witness Schmus testified that what was being sold was "a medium of exchange," and, was obviously non-plussed by the question regarding "annual dollar volume of sales." His immediate reaction was "I am not too sure that I follow that: the annual dollar sales of a personal finance company" (R. 353). He finally said that it was the amount of the loans the company made to the borrowers. It was never made clear just what these witnesses regarded as the "annual dollar volume of sales" within the statutory language—whether it was the amount of the money loaned, or the amount of interest earned, or the total amount of payments made by the borrowers.

to merchandising establishments, "epitomized by the corner grocery, the drug store and the department store" and the comparable "service" trades "akin to retail establishments" except that "their revenue is derived primarily from the sale of service instead of from the sale of merchandise" (Interpretative Bulletin No. 6, 1942 WH Manual 326, par. 24; *Aetna* Appx. 3).

C. IN ANY EVENT, THE TRIAL COURT'S CONCLUSION THAT RESPONDENTS FAILED TO ESTABLISH THAT ALL REQUIREMENTS FOR THE EXEMPTION HAD BEEN MET REPRESENTS A CORRECT APPRAISAL OF THE CONFLICTING EXPERT EVIDENCE

As the trial court noted: "Exemptions which withdraw from employees the benefits prescribed by the Act are to be strictly construed," and "[t]he burden rests on the party asserting any exemption to establish that all requirements for the exemption have been met" (R. 83).³⁵ While the trial court made no find-

³⁵ It is, of course, well-settled by this Court's decisions that any exemption from this Act must be "narrowly construed" and restricted to those "plainly and unmistakably within its terms and spirit" (*Phillips Co. v. Walling*, 324 U. S. 490, at 493; *Powell v. United States Cartridge Co.*, 339 U. S. 497, at 517; *Addison v. Holly Hill Co.*, 322 U. S. 607, at 617).

Equally well-settled is the principle that the employer claiming exemption has "the burden of proving the existence of [the] conditions" for exemption (*Walling v. General Industries Co.*, 330 U. S. 545, 548; *Casa Baldrich, Inc. v. Mitchell*, 214 F. 2d 703 (C. A. 1), and *Armstrong Co. v. Walling*, 161 F. 2d 515, 517 (C. A. 1); *Helliwell v. Haberman*, 140 F. 2d 833 (C. A. 2)). As pointed out *infra*, p. 55 in the text, the burden of proof rule has particular significance in determining whether the conditions of the amended Section 13 (a) (2) have been met because the legislative intent to impose upon the employer the burden of proving the specific conditions of this exemption was explicitly and emphatically stated.

ing of fact, as such, on the question whether respondents are engaged in "sale of goods or services (or of both)," it concluded that "[t]he lending of money does not constitute the sale of either goods or services within the intent of the Section 13 (a) (2) exemption" (R. 84). Much of respondents' expert evidence, of course, was designed to prove that the lending of money is "selling of services," and this evidence conflicted with the evidence of the Government experts.³⁰ The trial court's conclusion on this point, therefore, is, we submit, equivalent to a resolution of this conflicting evidence in favor of the Government. The failure to prove this basic condition is alone sufficient to support the trial court's decision, since Section 13 (a) (2) by its express terms presupposes that the establishment is engaged in making "sales of goods or services (or of both)." Absent this basic prerequisite, there is no occasion to apply the percentage or the "industry recognition" tests, as indeed there is no "annual dollar volume of sales" to which these tests can be applied.

The finding of the trial court that small loan companies "are regarded in the financial industry as retail service establishments" (even if the finding had not been carefully limited as "subject to the same qualifications" expressed by Judge Kirkpatrick in *Household*) (R. 83), is inadequate to supply the deficiency in respondents' evidence on the "sales of

³⁰ Respondents' experts testified that "everything in business or industry has to be the sale of a service or the sale of goods" (R. 350; also see *supra*, p. 7, fn. 6), whereas the Government experts testified that the lending of money cannot accurately be described as either "sales" or "services." See *supra*, pp. 7-8.

service" condition. Indeed, this finding itself, limited as it is by crucial "qualifications," falls far short of meeting the "industry recognition" test. For the "qualifications," as Judge Kirkpatrick clearly pointed out, are that both the terms "retail" and "service," as used in a broad, loose or analogous sense by the financial industry, mean something quite different from their meaning as used in the statutory exemption.³⁷ In short, Judge Kirkpatrick's "qualifi-

³⁷ The sweeping implications of the loan companies' contention were discerningly described by Judge Kirkpatrick in *Household*, as follows (106 • F. Supp. 541, 545, 547):

"* * * Used in a very broad generic sense, the word 'services' could apply to almost any economic endeavor and in that sense everybody who receives a payment for doing anything, including the transfer of property by sale, could be described as performing some kind of service. Incidentally, one of the difficulties involved in taking what an industry thinks or says about itself as the final and decisive factor in determining what constitutes a retail service establishment within the meaning of the Act is thus apparent. I suppose that it would not be too difficult for any trade association to adopt a deliberate policy of calling its business a 'service' business, a policy which, if persisted in long enough, could ripen into such recognition in the industry as would support plenty of testimony very much like that the defendant here has produced.

* * *

"* * * Expert witnesses called by the defendant testified that every form of economic transaction resulting in gain to either party must necessarily be a sale or the performance of a service * * *."

The judge concluded that Congress, in enacting the amendment, clearly had no intention thus "to hand over to any industry the right to judge whether it or any one of its branches was exempt as a retail service establishment" (*Id.* at 545).

cations" amounted to a finding that the expressions "service" and "retail" in the financial industry (in contrast to their usage in the "mercantile field") reflect simply the "very broad generic sense" and "overworked" usage of the terms, of little or no assistance in determining "the kind of recognition in the industry which Congress had in mind." (106 F. Supp. at 544-45). In the words of the First Circuit in *Aetna*, "Such usage hardly has relevance to the intended meaning of the term 'service establishment' as used in § 13 (a) (2)" (247 F. 2d at 193).

This explains why Judge Kirkpatrick and all of the other courts, except the majority below, have considered this "finding" to be "immaterial" (see District Court's Fdg. No. 7, R. 83). It is, in effect, a finding that the evidence failed to meet the "industry recognition" test in the sense that Congress intended the test to be applied. As pointed out by the First Circuit in *Aetna*, the legislative history plainly shows the inadequacy of the type of self-generated and self-serving evidence adduced by respondents. Not only did "the sponsors of the amendatory legislation repeatedly disavow[ed] an intention to permit each industry to decide for itself whether it was conducting a 'retail or service establishment' within the meaning of the exemption" (*Aetna*, 247 F. 2d at 193), but they stressed that the more impartial and informed determination of the Administrator was to be given particular weight, and that "the burden of showing" the conditions of the 75 percent test would definitely be on "each employer claiming the exemption".

Senator Holland not only expressly stated that it was the judgment of the sponsors that "we are simply using words and terms in the way they are customarily understood, just as was done on the passage of the original act" (95 Cong. Rec. 12510; *Aetna Appx.* 75); he also categorically denied that the "industry recognition" language would throw the situation open for each industry to determine whether its sales shall be considered retail or wholesale; *Aetna Appx.* 75-77). It was expressly pointed out that "in the particular industry" does not mean "by" the particular industry. Responding to Senator Aiken's inquiry, "Who does the recognizing?", Senator Holland answered: "The Administrator, the courts, the merchant, his employees, the enforcement officer, and everyone else." Senator Aiken then added: "If these words would permit each industry to decide for itself whether sales were retail or not, I could see considerable objection to the amendment" *ibid.*; *Aetna Appx.* 77). Senator Holland gave repeated assurances that, while the trade association's interpretation might be "one criterion," no one "and certainly not the Senator from Florida [the main sponsor of the provision as enacted], would wish to delegate full authority in the matter to a trade association or any other interested group" (95 Cong. Rec. 12501; *Aetna Appx.* 58).³⁸

³⁸ For more comprehensive discussion and excerpts from the debates see the Department's Interpretative Bulletin on this exemption. 29 CFR, 1958 Supp., 779.8.

The Congressional debates clearly reflect an intent to give particular weight to the interpretation of the Administrator with respect to the "industry recognition" test. In answer to a

Virtually all of respondents' evidence relating to the "industry recognition" test was of a self-generated and self-serving nature,³⁹ and was contradicted

question by Senator Douglas as to who is to define what is recognized as retail sales or services in the particular industry. Senator Holland replied, "Who but the Administrator?" (95 Cong. Rec. 12501), observing that there would, of course, always be "access to the courts" if the individual person concerned did not regard the administrative ruling as sound (95 Cong. Rec. 12502). Representative Lucas, commenting on the practical difficulties involved in determining the question of recognition in the particular industry, said:

The other charge against my amendment has been that it would make the exemption difficult, if not impossible, to apply, because years of litigation would be required to ascertain what is recognized as a retail sale in various industries. This charge is completely baseless. The Administrator, through his 11 years of administration of the existing law, has come to know quite well what sales and services are recognized as retail in each particular industry [95 Cong. Rec. 11116].

Thus, the net import of the legislative debates on this point plainly reflects an intent to give particular weight to the Administrator's interpretation which would reflect a much broader and greater variety of interested views and a more impartial and informed judgment than could be expected from the self-interested industry, or that could possibly be acquired by a court from a single case. In this special situation, therefore, there is particularly forceful reason for giving to the administrative interpretation the great weight commended by this Court in *Skidmore v. Swift & Co.*, 323 U. S. 134, 139-140.

³⁹The record as a whole clearly corroborates Judge Kirkpatrick's characterization of respondents' evidence on the existence of a retail concept in the financial industry as merely "an analogy borrowed from the mercantile field * * * very much in the same way that, as one of defendant's witnesses testified, 'the fellows around the bank' (the Bankers Trust Company of New York) call the bank's installment department 'the bargain basement.'" Such broad, loose, usage of the words "service" and "retail"; Judge Kirkpatrick concluded, is

not only by the administrative interpretation and judgment but also by objective well-qualified experts and by standard Government reports and publications. The trial court below (and all of the trial courts in the other loan company cases) clearly evaluated this evidence correctly and according to the standards intended by Congress. Certainly, at the very least, this appraisal of the evidence was not so clearly erroneous as to warrant reversal on appeal. On the contrary, we submit that the standard by which the Sixth Circuit appraised the evidence, ignoring the legislative intent, was clearly erroneous.

In addition to these deficiencies in respondents' "industry recognition" evidence—and this is wholly apart from the fundamental question whether the "industry recognition" test has any application whatever to credit companies (see *supra*, pp. 25–33, 45–48)—respondents' evidence is also defective in another important respect, *i. e.*, the patent lack of support for its claim that the discount portion of its business is

plainly "not the determining factor in resolving the issue at hand," since it is "doubtful" that this is "the kind of recognition in the industry which Congress had in mind" (*Household*, 106 F. Supp. at 544–545). Like the loose use of the term "service," the evidence shows that the term "retail" in this industry has been used for little other than "advertising and public relations value" (see *Household*, 106 F. Supp. at 545), having had its origin and connotation in the efforts of small loan companies to be relieved of the usury laws and to justify their high interest rates (see the Statement, *supra*, p. 10). However legitimate it might be for the industry to draw such an analogy as an argument to fortify its public-relations or lobbying purposes, it is quite another matter to seek to take advantage of this self-serving analogy in order to avoid the labor standards of this Act.

retail selling. The discount transactions, which are described in the stipulation (agreed to by respondents) as "purchases" and "purchasing" of conditional sales contracts from dealers (R. 8-9), admittedly account for 40 percent of respondents' gross dollar volume of business (R. 80, 82).

In sum, the trial court's conclusion that respondents had not met their burden of proof is amply sustained by the record. The burden of proof rule has particular significance in construing the "industry recognition" test of Section 13 (a) (2), because Congress, as evidenced by its debates and reports on this provision, explicitly indicated its reliance upon this rule to make the application of this test administratively workable. The sponsors of the amendment emphasized that the burden would be on the employer to show that he qualified under this test and that it imposed "no additional burden or duty * * * upon the Administrator" (95 Cong. Rec. 12502, *Aetna* Appx., 64). Thus, the Statement of the Majority of the Senate Conferees on the Conference Report of the Amendments as enacted states unequivocally:

It is the intent of the conference agreement to place on each *employer* claiming the exemption the *burden* of showing that 75 percent of the particular establishment's sales are not for resale *and* are recognized as retail in the particular industry. [95 Cong. Rec. 14877; *Aetna* Appx. 9-10; emphasis added.] ⁴⁰

⁴⁰ In explanation, Senator Holland repeatedly made a special point of emphasizing this:

* * * An *employer* claiming exemption would have the *burden* of proving to the courts that, in fact, 75 percent

of his sales or services are recognized as retail in his industry.

I digress at this point long enough to remind the Senate that *no additional burden or duty is placed upon the Administrator by this act, but that, to the contrary, the burden is placed upon the employer claiming exemption to show that, in fact, 75 percent of his sales or services are recognized as retail in his particular industry.*

* * * Moreover, it should be remembered that *any employer who asserts that his establishment is exempt must assume the burden of proving that at least 75 percent of his sales are recognized in his industry as retail. This is not a task which the Administrator has to assume.*

Anyone claiming an exemption does it with full knowledge that the burden is upon him to establish to the sound satisfaction of the Administrator or his agents that more than 75 percent of the sales have been made at retail, and, of course, on the intrastate level in the community in which the business is located [95 Cong. Rec. 12502; Aetna Appx. 64, 66; emphasis added].

Similarly, the chief proponent of this proposal in the House, Representative Lucas, assured his colleagues:

* * * *The employer claiming exemption would have the burden of proving that at least 75 percent of his sales are recognized as retail in his industry [95 Cong. Rec. 11116; Aetna Appx. 23; emphasis added].*

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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JANUARY 1959.

APPENDIX

The Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U. S. C. 201), provides in pertinent part:

SEC. 7. [63 Stat. 912-913]:

(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a work-week longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Sec. 13. [63 Stat. 917]:

(a) The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry;¹ or (3) any employee employed by any establishment engaged in laundering, cleaning or repairing clothing or fabrics, more than 50

¹ Prior to the 1949 amendments, Section 13 (a) (2) read simply: "Any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" (52 Stat. 1067).

per centum of which establishment's annual dollar volume of sales of such services is made within the State in which the establishment is located: *Provided*, That 75 per centum of such establishment's annual dollar volume of sales of such services is made to customers who are not engaged in a mining, manufacturing, transportation, or communications business; or (4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry, notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided*, That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; * * *.

SEC. 3. [52 Stat. 1061] As used in this Act—

* * * * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

No. 161

Office-Supreme Court, U.S.

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IN THE

Supreme Court of the United States

October Term, 1958

JAMES P. MITCHELL, Secretary of Labor, United States
Department of Labor,

Petitioner,

—v.—

KENTUCKY FINANCE COMPANY, INC. and
KENTUCKY DISCOUNT, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

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IN THE
Supreme Court of the United States

October Term, 1958

No. 161

JAMES P. MITCHELL, Secretary of Labor, United States
Department of Labor,

Petitioner,

—v.—

KENTUCKY FINANCE COMPANY, INC. and
KENTUCKY DISCOUNT, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

Opinions Below

The opinion of the District Court (R. 82-84) is reported at 150 F. Supp. 368. The opinion of the Court of Appeals (R. 356-361) is reported at 254 F. 2d 8.

Jurisdiction

The judgment of the Court of Appeals was entered April 15, 1958. The petition for a writ of certiorari was filed July 9, 1958, and was granted October 13, 1958 (R. 361). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

Question Presented

Whether respondents' small loan office, licensed under the laws of Kentucky and catering to residents and persons employed in the Louisville, Kentucky area, which meets each of the tests and the definition of a retail service establishment enumerated in Section 13(a)(2) of the Fair Labor Standards Act, qualifies for exemption as provided in said section. A subsidiary question is whether the clear language of the amended section showing the Congressional intent should be overridden by some of the legislative comments susceptible of a different construction.

Statute Involved

Section 7 of the Fair Labor Standards Act of 1938 as amended requires payment of overtime compensation to employees engaged in commerce, or in the production of goods for commerce. Section 13(a)(2), the construction of which is involved in this action, insofar as material is as follows:

"The provisions of section 6 and 7 shall not apply with respect to * * * any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry * * *."

Statement

Petitioner appeals from a decision of the Court of Appeals for the 6th Circuit dismissing petitioner's complaint in an action for an injunction to restrain respondents' alleged violations of the Fair Labor Standards Act.

Rejecting petitioner's contention that the tests provided by Section 13(a)(2) may be applied only to a restricted category of businesses, the Court below held respondents' small loan office to be an exempt establishment because it met each of the tests and conformed to the "clear and unambiguous" definition of a retail service establishment provided by said exemption section. This, because more than 50% of the annual dollar volume of its loans were made within the State of Kentucky, none was for resale, and the establishment was recognized in the financial industry, of which it is a part, as rendering retail services (R. 358-60).

Respondents' establishment caters to consumer needs, at a local retail level.

The facts respecting the operations carried on at respondents' small loan office in Louisville, Kentucky, are covered by stipulations of the parties. Respondents conceded that their seven full-time and two part-time employees were covered by the overtime provisions of the Fair Labor Standards Act and that the Act had been violated, unless they were exempt under Section 13(a)(2) as employees of a retail service establishment (R. 6-14; 16-18).

Kentucky Finance, one of the respondents, is licensed under the Kentucky small loan law (KRS Chapter 288) to, and does, make personal and chattel loans ranging from \$5.00 to \$300.00 (R. 7-8, 82). These loans, which average slightly over \$200.00 (R. 28), are all made *over the counter*

at respondents' office (R. 8), principally to laborers and clerical workers (R. 28) more than 90% of whom live in Kentucky (R. 10). Life insurance is made available to cover the amount of the loan (R. 40-41).

The money is used for consumer and household purposes (R. 28-29) for which the borrowers generally cannot get credit from other types of lenders (R. 40):

" * * * for household needs such as food bills, medical, dental bills, hospital bills * * * school expenses * * * . A good percentage is also loaned to pay already existing * * * obligations, to retail establishments such as grocery stores, furniture stores, and so forth" (R. 28).

Kentucky Discount, the other respondent, purchases from appliance and furniture retail dealers conditional sales contracts covering such items as television sets, washers, stoves and refrigerators (R. 9, 29, 82). Except for three occasions, the contracts were purchased on an individual basis (R. 29, 33-34). Because the consumer is treated as the borrower, it is his credit that is investigated, and not the dealer's, and, based on appraisal of the consumer's credit, Kentucky Discount rejected as many as 25% of the contracts offered (R. 9, 29-30). Contracts are sometimes accepted with recourse to the retail dealer, largely to prevent fraudulent misrepresentation as to the terms of the sale (R. 31-32). While it pays the retailer for the purchase price of the commodity, Kentucky Discount *receives the installment payments directly from the consumer* (R. 30).

The Court of Appeals summed up respondents' activities by stating "that the two appellants constituted a single business unit engaged in the loaning of money to individuals for their use in paying for goods that they consumed * * * " (R. 358).

Thus, both the personal loans made—which account for approximately 60% of the dollar volume of the business—and the installment contract loans were solely for the per-

sonal needs of the ultimate consumer. None of these loans can be considered as having been made for "resale", none for re-lending to others, and none for business purposes (R. 29, 82).

Respondents' office recognized in financial industry as retail establishment.

The evidence in the *Houshold* case, the first of the three test cases mentioned in the opinion below, was by stipula-

* *Mitchell v. Household Finance*, 208 F. 2d 667, reversing *Tobin v. Household Finance Corp.*, 106 F. Supp. 541. There, the Court of Appeals for the Third Circuit reversed the trial court's finding on coverage and, therefore, did not reach the retail exemption issue (208 F. 2d, at 672). The Trial Court had found that within the financial industry small loan companies were recognized as retail institutions but held that this was not controlling because Household's services were not susceptible of classification as "retail services" (106 F. Supp. 546).

In *Aetna Finance Company v. Mitchell*, 144 F. Supp. 528, aff'd. 247 F. 2d 190 (CA 1) the Trial Court followed District Judge Kirkpatrick in *Houshold*. It, too, found that the Aetna small loan office met each of the three statutory tests, including the industry recognition test, but this was held "not decisive" (144 F. Supp. at 534).

In the instant case, the Trial Court rendered no opinion of his own, but found that "local offices of small loan companies are regarded in the financial industry as retail service establishments. However, this finding becomes immaterial in view of Conclusion of Law No. A * * *". Said Conclusion states that on the authority of the trial courts in *Houshold* and *Aetna* respondents' establishment none the less was "not a retail or service establishment within the meaning of the exemption * * *" (R. 83).

Such holding, if upheld, would defeat the chief purpose of the 1949 amendment—to provide a definition. "It is our desire," said the Senate sponsor, Senator Holland, "to clarify entirely the status of retail and service establishments by defining them, and letting them know beyond any peradventure of a doubt, whether and when they are in fact exempt * * *" (95 Cong. Rec. 12491). A definition of a retail service establishment which requires a preliminary finding of susceptibility to application of the definition is not a definition. A definition which is "not decisive" is likewise no definition.

The Court of Appeals in this case refused to follow Judge Kirkpatrick's and petitioner's interpretation. In the only case, since

tion made part of the record here (R. 13) and consisted in part of expert testimony by these leaders in the *finance field*:

Leon Henderson, economist and for several years head of the Department of Remedial Loans of the Russell Sage Foundation with a background of experience in finance and Government as well as in the small loan field (R. 113 ff.), who had supported the enactment of the uniform small loan law;

Elmer Schmus, cashier and vice-president of the First National Bank of Chicago—a leading supplier of credit to small loan companies—and the leading banking authority in the small loan field (R. 143 ff.); and

Joseph P. Dreibelbis, head of the banking department and vice-president of Bankers Trust Company of New York, and who, as General Attorney to the Board of Governors of the Federal Reserve System, had researched and drafted "Regulation W" as a war-time measure to control the volume of retail sales by restricting the volume of retail credit (R. 152 ff.).

These experts, each speaking from the point of view of one or more segments of the finance industry, demonstrated that the small loan business is a part of the financial industry (R. 120, 146, 155), that for a long time there has existed a well-recognized distinction between wholesale and retail lending in that particular industry (R. 124, 148, 156), and that small loan companies are, and long prior to 1938 were, regarded as retail service businesses within that particular industry (R. 140, 147, 156).

Based on his experience, commencing with his work with the Russell Sage Foundation, and the studies made in

decided, a trial court followed the 6th Circuit herein rather than the 1st Circuit's holding in *Acton, Dykes v. Atlas Finance Company, Inc.* and *O'Brien v. Atlas Finance Company, Inc.*, U. S. D. C., S. D. Ga., decided September 4, 1958.

connection therewith, Mr. Henderson found a "commonly recognized difference between the financial instrumentalities which are wholesalers and the instrumentalities which are retailers" (R. 124).

The distinction is between those which extend credit to business and those which extend credit to consumers for their personal needs (R. 124). The size of the loan and the purpose for which it is used are criteria, but

"the ultimate test was whether * * * the credit or the loan was to the individual for consumptive purposes" (R. 124).

In his dealings with commercial banks, Mr. Henderson was often told that they were "wholesalers of credit" (R. 125) and he recalled numerous discussions on the subject of retail financing with bankers, state banking officials, governors of several states and representatives of such organizations as Chambers of Commerce and Better Business Bureaus (R. 126; Court Exhibit 1, *Household* record pp. 68-9a).

When asked whether a small loan business is considered similar to rather than identical with other retail businesses, Mr. Henderson replied:

"Well, in my opinion they are identical. When I was dealing with this thing I would be talking about the retail company in the small loan business * * * that what you needed was a retailer who had the same kind of attitude towards his customer and dealt with him in the same kind of way as the other retail institutions in the town. * * * the small loan companies would be in the available, the downtown shopping areas, they would use generally the same media of communication, they dealt with the same customers and they were offering service instead of goods" (Court Exhibit 1, *Household Rec.* p. 134a; see also, R. 211-212).

Mr. Henderson cited numerous writings in the financial industry to support his expert opinion on the views of the industry, some examples of which are set forth in the accompanying footnote.*

* From a pamphlet issued by the Boston Better Business Bureau in 1937:

"The price you must pay to borrow money is of primary concern. It is well, therefore, to understand in the beginning that the rate for a small loan is, of necessity, higher than that charged for a commercial loan by a bank. One reason is that the lenders of large sums wholesale money while the lenders of small sums retail it" p. 4 (R. 135).

From a pamphlet, entitled "Credit For Consumers," published by the Public Affairs Committee:

"Any consumer who bought flour by the carload would get a load price, but no consumer wants wholesale lots. The householder wants only a few pounds delivered at her home or her neighborhood store. Similarly, the consumer wants credit in small lots to fit his circumstances, and as with flour or coal or cotton cloth, he may pay more at retail than at wholesale" p. 25 (R. 69).

From "The Licensed Lender" by Edgar F. Fowler, published in March, 1938:

"Commercial banks are wholesalers of cash—except where they operate small loan departments—while personal loan companies are retailers" p. 132 (R. 132).

From "The Personal Finance Business in New York," published by the New York Association of Personal Finance Companies in 1937:

"In retailing \$1,000,000, the small loan company must interview 22,700 applicants" p. 7 (R. 128).

A more recent publication of the New York State Consumer Finance Association in 1950 entitled "A Look at the Consumer Finance Business in New York State" states:

"The fundamental reason why these charges are higher . . . is that it costs more to grant retail credit than wholesale credit" p. 14 (R. 128).

The Government introduced as an exhibit in this case an excerpt from a book—1952 edition—authored by Dr. Phelps, entitled "Financing the Installment Purchases of the American Family," as showing absence of the term "retail financing." However, the 1953 edition by the same author, at page 103, contains the following:

"Finance Companies—Wholesale financing is furnished to finance the current wholesale purchases from manufacturers

And it should be noted that use of the terms "wholesale" and "retail" with respect to the financial industry is not restricted to official or technical publications. An article in the recent—January 12, 1959—issue of *LIFE MAGAZINE* dealing with the proposed merger of Morgan & Co. with Guaranty Trust Co. of New York states:

"Like Morgan, Guaranty is primarily a wholesale bank, catering to corporations rather than to small individual borrowers" (p. 73).

Dr. Morris R. Neifeld, the only expert who testified personally upon the trial of this case, fully corroborated the testimony on industry recognition presented in *Household*. He is a well-known economist and lecturer on consumer finance and consumer credit. He served as a representative of the National Association of Small Loan Companies in connection with the administration of Regulation "W" (R. 43-45). Author of numerous articles on finance and consumer credit, Dr. Neifeld stated in his book, "The Personal Finance Business," published in 1933,

"Loans which are a mere fraction of the amounts granted by commercial banks, and multitudinous clerical and managerial activities make for the difference between wholesale and retail lending" (R. 57).

At the trial, Dr. Neifeld pointed out that "[W]holesale loans are made for people who put the money to work in industry or commerce" and that loans at retail are

by distributors and dealers, especially automobiles, home appliances, including radios and television sets, heating equipment, time and labor-saving machinery, and other articles usually sold on the installment plan.

"Retail financing is supplied to finance the final sale of products sold on the installment plan by manufacturers, distributors and dealers, especially automobiles, home appliances, including radios and television sets, heating equipment and time and labor-saving machinery."

made to the "individual consumer, the money is put for the use of the family * * * The money itself does not generate income." He explained that those who are wholesalers of credit lend money to businesses or for relending to others. He listed the credit union and personal finance companies, small loan companies, and industrial loan companies as examples of retailing in the financial industry (R. 49).

He illustrated this wholesale-retail concept, as recognized in the financial industry, by contrasting a bank loan to a small loan company, with one by such a small loan company to a consumer. The former is "a wholesale loan, because they have made it to the company which in turn re-lends it to individual consumers" (R. 54). The latter loan, he stated, was "purely retail" (R. 55).

Dr. Neifeld declared that lending money is clearly a service comparable to a number of the types of services recognized by the Wage and Hour Administrator as retail services—such as rental of hotel rooms and car and boat rentals. In his view the Administrator should have no greater difficulty in regarding a small loan office as a retail service establishment than in so regarding embalming establishments, dance halls, crematories, etc. (R. 71, 72), all of which are to be found on the Administrator's list of exempt retail service establishments. (See Interpretive Bulletin No. 6.)

The witness emphasized that he was stating the industry's views, made available to him by reason of his numerous contacts with executives of financial institutions; also by his attendance at and participation in symposiums and annual meetings of such organizations as American Bankers Association, American Industrial Bankers Association, and The American Finance Conference Association (R. 45-46).

Petitioner's experts did not reflect views of the financial industry.

The Department of Labor relied on the testimony in *Household* of a Federal Reserve Board official and two Wharton School professors.

David C. Melnicoff, associated with the Federal Reserve Bank of Philadelphia, placed great reliance on the classifications in the Standard Industrial Classification Manual (R. 334, 336) and gave his definition of "retailing"—which he would not apply to a small loan office—in terms of how "the general public or the general business community would understand the word" (R. 341).

Asked if he made any effort "to ascertain the views of the financial industry * * * as to whether or not this [the small loan business] was recognized as retail in the industry," Mr. Melnicoff answered that he "was not requested to do that, sir. I was requested to come and state my opinion" (Court Exhibit 1—Household Rec. 279a).

Professor Whittlesey agreed with the views expressed by Mr. Melnicoff (R. 161), adding that:

"as reflecting traditional attitudes on this subject * * * at institutions of business * * * such as the Wharton School, it is customary to teach Retailing in the Department of Marketing * * * so far as I know, there is no discussion of finance companies in the Marketing Department" * (R. 161).

The problem was "a new one" to Professor Whittlesey, who had never discussed it with people in the finance field (R. 159). He had difficulty considering retailing as ap-

* See petitioner's comment conceding that his witnesses interpreted the statutory language as its terms are used "in the field of marketing and retailing" rather than in the financial field (Br., p. 7).

plicable to anything except the sale of commodities at retail (Court Exhibit 1, Household Rec. pp. 323-4a; 361-2a; see also Petitioner's Br., p. 12; R. 347). Obviously, the statute as indicated by the legislative history intended no such restriction.

Dr. Blankertz, a Professor of Marketing at the Wharton School, gave as the basis for his opinion:

"One of our primary reliances is the American Marketing Association's Committee on Definitions, * * *

We also place reliance on the Marketing Handbook, so-called, which is a basic coverage of the field. In that handbook, they give no recognition to financial institutions, which is part of my answer why they have no such recognition. They do not recognize them as being in the field of Marketing: the concept of retailing is lacking.

We obviously rely on the census for many definitions we use not only as teachers but as statisticians, as researchers, and the census bureau, again, does not classify financial institutions as retailing and that is why I have so said that I did not consider them retailing" (R. 343-344).

Thus, the only evidence of the attitude of the financial industry is that offered by respondents—as the Court of Appeals described them—"highly qualified experts in the financial industry" (R. 359-60): that small loan offices are regarded as retail service establishments "in the particular industry"—the financial industry.

Summary of Argument

Respondents conduct a local establishment whose small loan activities are regulated under the Kentucky Small Loan Law. It meets each of the three clearly defined tests of a retail service establishment set forth in the amended Section 13(a)(2) of the Fair Labor Standards Act, in-

cluding the industry recognition test. The legislative history of the original Act demonstrates that, from the very beginning, Congress intended to exempt local establishments of this type and that, in enacting the 1949 amendment, Congress desired to make certain that such intention would not be further thwarted through restrictive administrative rulings. To accomplish this purpose, Section 13(a)(2) provides definitive tests and a definition which were declared to be binding on the Administrator and the Courts.

I. *As stated by the Court of Appeals, the new exemption section is "clear and unambiguous"; the establishment herein conforms to the definition of a retail service establishment as provided by that section.*

Section 13(a)(2), as amended, defines a retail establishment to

"mean an establishment 75 per centum of whose * * * services * * * is not for resale and is recognized as retail * * * services in the particular industry * * *."

The findings below that respondents' establishment met the percentage tests and met also the industry recognition test is based not merely on the overwhelming evidence but on the *only relevant evidence*.

As the Court below so aptly stated:

"The evidence that it was so considered by the industry is cumulative, both in oral testimony of highly qualified experts in the financial industry and from the writings of those engaged in it. It is not in any measure refuted by those familiar with and active in the industry" (R. 359-360).

The testimony of two bankers and that of Leon Henderson, none of whom is affiliated with any small loan company, supported by an economist in the small loan field

and by the writings in the industry, overwhelmingly demonstrated that there is a concept of wholesaling and retailing in the financial industry. It also demonstrated beyond peradventure that small loan offices are recognized as rendering retail services and as retail service establishments in that "particular industry."

The Government's witnesses, on the other hand, gave their personal opinions; they made no effort to reflect the views of the industry and relied instead on publications such as the Standard Industrial Classification Manual; the Census, Marketing Hand Books, etc., which have no relevance to the question of recognition in the "particular industry." (See *Boisseau v. Mitchell*, 218 F. 2d 734, 738; *Mitchell v. Taylor Fertilizer Works*, 233 F. 2d 284, 288.)

II. *The legislative history demonstrates that Congress has always intended to exclude from coverage the purely local activities carried on by establishments such as the one here involved and amended the statute to make certain that that intention would not be further thwarted.*

(1) Congress intended "to leave local business to the protection of the states" (*Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 570).

The Senate Report on the 1938 Act states that "the bill carefully excludes from its scope business * * * that is of a purely local nature" and "leaves to state and local communities * * * those local service * * * trades that do not substantially influence the stream of interstate commerce." It declares also that it was not intended to include under the Act "purely local and small business establishments that happened to lie near state lines" and thus "serve a wholly local community trade within two states" (Senate Rep. No. 884, 75th Cong., 1st Sess., p. 5).

To insulate such local establishments as respondents' from the Act's coverage, the original Section 13(a)(2) exempted establishments "the greater part of whose selling or service is in intrastate commerce." However, because the original exemption contained no definition of a retail establishment, the Administrator proceeded to make his own definitions and his own listings, placing "personal loan companies" on his non-exempt list.

(2) *Congress amended Section 13(a)(2) in 1949 so as to provide a binding definition of a retail establishment and to overcome the narrowing effect of the administrative rulings.* The amendment was intended to "clarify" through the use of "terms in the way they are customarily understood," thus to make certain that the original Congressional intent would be carried out—that the exemption would be applied to businesses "of a purely local type which serve a particular local community and which do not send their products into the streams of interstate commerce" (95 Cong. Rec. 11,002; 12,491; 12,510).

The Senate and House sponsors repeatedly declared that the definition and tests set forth in the amended section were intended to correct the errors of the Administrator (*id.* 12,494-95, 12,497, 12,498).

Over the Administrator's protests (*id.* 12,511) they intended to provide a new definition by means of "definitive" tests, thus "making clear what is meant by retail sales, retail establishment and service establishment: so as to clear up any "doubt as to who is within the act and who is not within the act" (*id.* 11,002, 12,510, 12,519).

The statutory tests were to be controlling, so that "any sale or service [absent a resale] * * * will have to be treated by the Administrator and courts as a retail sale or service, so long as such sale or service is recognized in the particular industry as a retail sale or service" (*id.* 12,502).

Every establishment meeting the statutory definition was to be exempt and establishments like respondents' are not to be excluded on the theory that they are "credit companies". The statutory language being clear, it should not be disregarded because of such legislative comments, as the one respecting "credit companies" whose meaning is at least doubtful. In any event, personal (or small) loan companies are not "credit companies". Regardless of how commercial credit companies may be considered, personal or small loan companies, as the proof in this case abundantly discloses, are considered retail businesses in the financial industry.

Such proof is not to be rejected on the theory, as petitioner puts it, that it is "self-serving" or "self-generating". This objection was made before the adoption of the amendment and was rejected in Congress. It has since been made in the courts and again rejected (*Boisseau and Taylor Fertilizer cases, supra.*)

In short, respondents' office is a local service business at the end of the stream of commerce, which Congress from the beginning intended to insulate from coverage under the Act; it meets the statutory tests and the Court of Appeals was wholly correct in applying the statute in accordance with its plain terms.

POINT I

Respondents' small loan office in Louisville, Kentucky, meets each of the three tests of a retail service establishment provided by the clear and unambiguous amended Section 13(a) (2).

Congress could not have been more explicit in providing in the exemption section a percentage limitation on interstate commerce and in defining a retail service establishment to

"mean an establishment 75 percentum of whose * * * services * * * is not for resale and is recognized as retail * * * services in the particular industry * * *"

There is nothing technical or difficult about the language employed and the section " * * * is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." (*Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 618)

That "right" should not be denied the respondents who, in the event of misunderstanding, would face a general injunction "requiring them to live under pain of contempt citation." (See Mr. Justice Whittaker's dissent in *Mitchell v. Lublin, McGaughey & Associates, et al.*, decided January 12, 1959.)

The 5th Circuit, in *Boisseau v. Mitchell*, 218 F. 2d 734, declared that

"The exemption as now phrased establishes three tests: (1) more than half of the establishment's sales or services must be made or rendered within the state where the establishment is located; (2) at least 75 per cent of the sales or services must not be for resale; and (3) at least 75 per cent of the sales or services must be recognized as retail sales or services in the particular industry" (p. 737).

The First Circuit interpretation in *Casa Baldrich, Inc. v. Mitchell*, 214 F. 2d 703, was no different and the Court of Appeals in the instant case found that "[T]he language of the 1949 amendment is clear and unambiguous" (R. 360).

Applying these three tests: (1) it is undisputed that more than 50 per cent—in fact, more than 90 per cent—of respondents' services were rendered within the State of Kentucky where the establishment is located; (2) since all loans were to ultimate consumers to finance their consumer needs or their purchases of goods for personal use, there was no element of resale involved; and (3) the services performed ~~by respondents' establishment were~~ "recognized as retail * * * services in the particular industry."

No comment is necessary with respect to the first two of these tests. However, in view of petitioner's attacks on the significance of the finding of industry recognition, we comment briefly on the nature of the proof offered respecting the third test.

We have set forth at pages 5-10, *supra*, a summary of the expert testimony offered in the *Household* case as supplemented in this case which demonstrates that small loan offices are part of the financial industry, that in that industry there is a well defined distinction between retailers and wholesalers, and that small loan offices are and prior to 1938 were regarded as retail service establishments in the financial industry. That evidence was supported by the literature of the financial industry (see footnote, pp. 8-9, *supra*).

The Government, on the other hand, relied on "objective * * * experts"—"qualified" only in fields other than financial—and on "standard Government reports and publications" (see Br. of petitioner, p. 19)—such as Standard Industrial Classification Manual, Marketing Hand Books, the Cen-

sus, etc. Indeed, in its brief below, petitioner boasted that its witnesses

"testified not from the point of view of the financial community but rather 'from the studies I have engaged in research and concerning shopping of people, their behavior as consumers, *they would not so recognize financial institutions of any kind as being a retailing purchase.*'" (Emphasis in original.) (Brief for Plaintiff, U. S. D. C., p. 22.)

And when, at the trial, counsel for respondents stated that the Government witnesses "did not speak from the point of view of the financial industry as the witnesses for the defendant did," petitioner's counsel replied:

"We submit that they spoke from the standpoint of public interest" (R. 78).

But the statute calls for recognition "in the particular industry" and sponsors of the legislation repeatedly referred to recognition "in the particular industry" (95 Cong. Rec. 12,502) and spoke of the industry recognition test as "one clearly understood by both the employees and the employers in the industry involved" (*id.* 12,502):

Petitioner would have the test herein applied in accordance with classifications in the Standard Industrial Classification Manual and similar Government publications (Pet. Br. pp. 8, 54). But, as Leon Henderson indicated (Court Ex. 1, *Household Rec.* pp. 152a-3a), these classifications must be considered in light of the purposes they were intended to serve. He pointed out that the Social Security Board and the Bureau of Internal Revenue, as well as branches of the Department of Labor itself, have their own differing classifications. See *Boisseau v. Mitchell*, 218 F. 2d 734; *Mitchell v. Pascal System, Inc.*, 226 F. 2d 391 (7th Cir.).

In *Mitchell v. T. F. Taylor Fertilizer Works*, 233 F. 2d 284, the Fifth Circuit, in dealing with the testimony of the

petitioner's expert, stated what may well be said about expert testimony offered by petitioner in this case:

" * * * Professor Beckman's definition may be valid for census and other purposes, but if not recognized in the fertilizer industry can have no bearing on the appellee's right to an exemption.

"The expert believed the matter governed by general definitions, which, if Congress had so intended, could have been placed in the Act itself. The fact that Congress referred the matter to industry recognition indicates that it intended a more flexible rule, adaptable to the many various branches of industry" (p. 288).

Petitioner objects to giving effect to views of an industry—that there was no intention to permit an industry to determine its status.* But Senators Holland and Taft declared that retailing was to be "defined variably in various industries by determining what are the habits and practices in the industry" (*id.* 12,510). Senator Taft added: "what is retail and what is wholesale" is "a ques-

* This objection was one of the bases for the "qualifications" referred to in the finding on industry recognition made by the Trial Court in this case: "Subject to the same qualifications expressed by Chief Judge Kirkpatrick in *Tobin v. Household Finance Corp.*, 106 F. Supp. 541 (D. C. E. D. Pa.), and Judge Day in *Mitchell v. Aetna Finance Company*, 144 F. Supp. 528 (D. C. R. I.), this Court finds that the local offices of small loan companies are regarded in the financial industry as retail service establishments" (R. 83).

Judge Kirkpatrick, with whom Judge Day concurred, stated "one of the difficulties involved in taking what an industry thinks or says about itself" was that it was possible for "any trade association to adopt a deliberate policy of calling its business a 'service business'" (p. 545 of 106 F. Supp.).

Though the Court of Appeals in *Aetna* placed major reliance on the Administrator's interpretations antedating the 1949 amendment (see 247 F. 2d 192-93), it also indicated objection to permitting an industry "to decide for itself" whether it was conducting a "retail or service establishment" (247 F. 2d at p. 193). But see legislative discussion on this subject (pp. 34-36, *infra*).

tion of fact which we are perfectly able to determine" (*id.* 12,515).

It is submitted that respondents more than sustained their burden on this "question of fact", as the trial court in each of the three test cases found. Thus, since their establishment meets each of "the three percentage requirements" and its services are recognized in the industry as retail services, respondents' employees are exempt pursuant to the amended exemption section (See *Boisseau v. Mitchell*, *supra*, at p. 739 of 218 F. 2d; *Mitchell v. Taylor Fertilizer Works*, *supra*, at page 287 of 233 F. 2d).

POINT II

The legislative history demonstrates that it has always been the Congressional purpose to exempt purely local establishments such as respondents' and that the 1949 amendment was enacted to make certain that such purpose would not be further thwarted by restrictive administrative rulings.

Since, as found by the Court of Appeals, the statutory language is "clear and unambiguous," it is sufficient for us to have demonstrated that respondents' office is a retail service establishment within the meaning of the clear language of the statute.

The Government's position is that it matters not that the language of the statute is "clear"; the Court should nevertheless look to the legislative history to find its meaning—one more consonant with the pre-1949 rulings of the Administrator. In seeking to accomplish this purpose, petitioner, using the repetitive method, urges that statements in the legislative history making reference to such doubtful terms as "credit companies" are sufficient to override the plain language of the statute.

But, legislative reports "cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms" (*United States v. Shreveport Grain & El. Co.*, 287 U. S. 77, 83).

However, if we do examine the legislative record, we find ample support for the Court of Appeals' appraisal of the statute; in the declarations of the sponsors who avowedly intended to "clarify entirely the status of retail and service establishments by defining them" (95 Cong. Rec. 12491) and were "simply using words and terms in the way they are customarily understood" * * * going far enough to leave something definitive by this amendment" (*id.* 12510).

We shall show further from the legislative record that Section 13(a)(2) was amended in 1949 (1) to reassert the original Congressional intent to exempt local establishments; (2) to overcome administrative misinterpretations; (3) to provide a definition of retail sales and services and retail establishments, (4) that would be binding "upon the Administrator and the courts", (5-6) every establishment being eligible if recognized as retail in its industry.

(1) Congress always intended to exclude from the Act's coverage purely local businesses such as respondents.

The purpose of the Fair Labor Standards Act was to make certain "that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions * * *" (*United States v. Darby*, 312 U. S. 100, 115). From the beginning, Congress "plainly indicated its purpose to leave local business to the protection of the states" (*Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 570), and this Court has warned that the courts "must be alert, therefore, not

to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation" (*10 East 40th Street Co. v. Callus*, 325 U. S. 578, 582-583).

In opening debate on the 1949 bill, Congressman Lucas prefaced his remarks by discussing the original 1938 Act and its purpose. He cited President Roosevelt's support of the

"legislation on behalf of those 'who toil in factory,' but he also stated that 'there are many purely local pursuits and services which no Federal legislation can effectively cover'."

The Congressman then called attention to a statement on this subject by Mr. Justice Black. In discussing the original 1938 bill—as Chairman of the Senate Labor Committee—Mr. Justice Black declared:

"that the bill was not intended to, and it did not, attempt to fix minimum wages and maximum hours in all the varied peculiarly local business units of the Nation, and that 'businesses of a purely local type which serve a particular local community and which do not send their products into the streams of interstate commerce can be better regulated by the laws of the communities and of the States in which the business units operate'—Eighty-first Congressional Record, page 7648" (95 Cong. Rec. 11002).

The Senate report on the bill which became the Act of 1938 states:

"The bill carefully excludes from its scope business in the several States that is of a purely local nature * * * It leaves to State and local communities their own responsibilities concerning those local service and other business trades that do not substantially influence the stream of interstate commerce. For example, the policy in this regard is such that it is not even intended to include in its scope these purely local and small

business establishments that happen to lie near State lines, and solely on account of such location, actually serve a wholly local community trade within two States" (Sen. Rep. No. 884, 75th Cong., 1st Sess., p. 5).

In keeping with this purpose Section 13(a)(2) of the original Act exempted

" * * * any employee engaged in any retail or service establishment the greater part of whose selling or service is in intrastate commerce; * * * "

(2) *The 1949 amendment was intended to correct the Administrator's misinterpretations and to restore the exemption as originally contemplated.*

The original exemption did not define a retail sales or service establishment. The Administrator, consequently, made his own regulations and his own lists of retail and non-retail establishments. He placed personal loan companies (not designated as "credit companies") on the non-exempt list (see 1941 Interpretative Bulletin No. 5). This pre-1949 ruling was never passed upon by the courts.

Congress became dissatisfied with the Administrator's rulings—some of which were described as having been "taken out of thin air" (95 Cong. Rec. 12500) and as having brought about a situation that was

"far afield * * * from the original purpose of the act * * * Nothing could be clearer from a reading of the debates at the time the law was passed" (*id.* 12498).

Asked whether "our proposed amendment [will] exempt any more employees than the present retail exemption?" Senator Holland replied:

"The answer is 'No,' insofar as concerns those who are exempted ~~under the proper meaning of the original act~~. The answer will be 'Yes' as to some undetermined number * * * who are included in the field that has been

included within the jurisdiction of this act by interpretative rulings and by the courts in following those rulings in some cases" (*id.* 12506).*

Earlier, Senator Holland had stated:

"I may say to the Senate that one of the things which have made for trouble in this matter has been the vacillation and the change in regulations and in attitude from time to time, which we think can be corrected only by making clear what is meant by a retail sale, retail establishments, and service establishments" (*id.* 12497).

Senator Taft found that the Administrator had "steadily encroached" on the exemption. He declared:

"The senior Senator from Florida [Senator Pepper] read a statement from the Wage-Hour Administrator that 200,000 workers would be excluded from the coverage of the act by the Holland amendment. I do not think any workers would be excluded from the coverage of the act *as it was originally enacted*. It is true that the Wage-Hour Administration, with the assistance of the courts, has *steadily encroached on the exemption* which was contained in the original act relating to retail establishments. I think the figure is excessive, but it may be that if we let the law entirely alone, the Wage-Hour Administrator would succeed in including into the act not only the 200,000 mentioned, but perhaps a million more persons employed in retail establishments. That is the reason for the amendment, because what has happened has been *a steady encroachment on the exemption* * * * " (*id.* 12515).

Congressman Lucas stated that the amendment was to have

* Unless otherwise indicated, emphasis in quotations from the Congressional Record may be deemed supplied.

"the effect of confirming the exemption for the various local neighborhood businesses whom it was the original purpose of the existing law to exempt" (*Aetna Appx. 13*).

In view of these comments, how can it be said that the amendment "was intended essentially to codify the previous administrative interpretation * * * "? (Pet. Br. p. 25.)

Nor can it be said that the legislative history shows a design to limit the exemption to such service establishments as resorts, hotels, etc. On this score, petitioner makes repeated references to the statement of Senator Holland, in which he mentions "resorts, hotels, repair garages * * * " etc., but, only in a footnote on page 43 of petitioner's brief, where the complete text of the statement appears, is it disclosed that the Senator's statement in describing retail service establishments concludes with

"and other establishments performing local services" (*id.* 12505).

Again, petitioner claims (Br. p. 30) that when the sponsors spoke of limiting the exemption to "establishments which are traditionally regarded as retail" they meant to limit it to the types of establishments previously so classified by the Administrator. * Congressman Lucas' use of the term "traditional" should be considered in context. He said:

* Petitioner goes so far as to urge (Br. footnote, p. 32) that "Section 16(c) of the 1949 Amending Act itself ratified the non-exempt status of the 'personal loan companies' * * * ." But Section 16(c) provides that the Administrator's interpretations were to remain in effect "*except to the extent that any such order, regulation, interpretation * * * may be inconsistent with the provisions of this act * * **" The legislative comments criticizing his rulings and the setting up of a new definition provides no blanket confirmation of the Administrator's pre-1949 rulings.

"My amendment clears up that doubt by exempting the establishments which are traditionally regarded as retail. It is only in the sense that it clarifies such doubt that my amendment can be regarded as expanding the present exemption. But in a real sense it is not expanding the exemption at all but simply confirming it for those establishments which the Congress always intended to exempt. The contrary view must assume that in granting the retail and service establishment exemption, Congress intended to reject what is *traditionally recognized as a retail sale or service in an industry and to adopt an arbitrary concept of what is retailing or servicing*" (95 Cong. Rec. 11116).

(3) The 1949 amendment was intended to provide a definition of a retail establishment.

The Government claims that the only purpose of the 1949 amendment was to abolish the consumer use test. That was one of the purposes, but certainly not the sole purpose. In 1949 there were two rival bills before the House: the Lesinski bill, "in substance the Administrator's recommendation" (Pet. br. p. 36) and the Lucas bill, which the Administrator opposed. By the former, confirmation was sought for "all the interpretations of the Administrator with reference to retail and service establishments" including his consumer use test (95 Cong. Rec. 11002). The Administrator opposed the Lucas bill upon the very ground that it would "substitute a completely new set of definitions of a retail or service establishment" (*id.* 12511).

But Congress rejected the Lesinski bill. Congressman Lucas stated the effect of his bill, as contrasted with the Lesinski bill, as follows:

"My bill has clarified the retail and service exemptions so that there can be no doubt as to who is within the act and who is not within the act" (*id.* 11002).

Senator Holland also emphasized the intention of providing a definition:

*"It is our desire to clarify entirely the status of retail and service establishments by defining them, and letting them know beyond any peradventure of a doubt, whether and when they are in fact exempt from the provisions of the law * * **

It is the view of the sponsors of the amendment that it is the duty of Congress at this time, while the act is being amended, to clarify the meaning of the terms 'retail establishment' and 'service establishment,' so that every person affected thereby, both employers and employees, including, of course, the Administrator and his staff, as well, may know who are intended to be exempted from the workings of the wage-and-hour law by the provision now proposed to be inserted in the law" (id. 12491).

The Senator declared that the uncertainty of and changes in regulations required that it be made

"clear what is meant by a retail sale, retail establishments, and service establishments" (id. 12497).

and

*"we are going far enough to leave something definitive by this amendment" that "what constitutes * * * service is defined variably in various industries by determining what are the habits and practices in the industry" (id. 12510).*

Petitioner (Br. p. 40) states that "ironically" the test upon which we "rely * * * is the very test which the amendment proposed 'to do away with', i.e., the distinction between 'consumer' and 'business use'".

We could say the same respecting the Administrator's retreat from that test which he always—and too narrowly—applied. However, the consumer test and the industry rec-

ognition test are not mutually exclusive save that, under the amended section, the former must give way to the latter.

There is nothing strange about the fact that the financial industry view—that an office engaged in lending small amounts to consumers for consumptive purposes on a local level is a retail service establishment—rests on the same basic criteria as those advanced by the Administrator prior to 1949 and adopted by the courts in a number of cases. The difficulty lay primarily in the Administrator's arbitrary application of such criteria. By means of the device of his "susceptibility test" he was able, at will, to exclude an establishment regardless of the fact that it conformed to such basic concepts of a retail sales or service establishment.*

Congress always intended to exempt such establishments as respondents' and in adopting the 1949 amendment it went "far enough to leave something definitive" so as to insure that its original intention in this regard would be carried out.

A clear definition of retail establishments was sought to avoid discrimination between businesses where

* In the October, 1950 Bulletin of petitioner's Wage and Hour Administrator appears the following description of a typically retail or service establishment:

"Typically a retail or service establishment is one which sells goods or services to the general public. It serves the everyday needs of the community in which it is located. The retail or service establishment performs a function in the business organization of the nation which is at the very end of the stream of distribution, disposing in small quantities of the products or skills of such organization and does not take part in the manufacturing processes" [Sec. 779.9 sub. (d)].

It is submitted that respondents' establishment answers this description of a retail service establishment.

" * * * both are local businesses and would have equal difficulty in conforming to national wage and hour standards, both are located in the same community, and, both draw employees from the same labor pool and having similar working conditions" (*id.* 12498).

Petitioner's Administrator himself recognized that "a completely new set of definitions" was being proposed by the Holland-Lucas bill. In a letter addressed to and read in the Senate by Senator Pepper, the Administrator stated:

"The bill would *substitute a completely new set of definitions of a retail or service establishment in place of the clear definition now recognized by the courts.* Years of litigation would be required to determine how the exemption should be applied. The amendment would give rise to exceedingly difficult problems in administration, *since it is by no means clear what different industries regard as retail sales*" (*id.* 12511).

(4) The three tests were to be controlling.

Senator Holland, in summing up, declared that the "exemption will apply only if *three* separate tests are met" (*id.* 12499) and that he wished "to discuss those *three* tests separately" (*id.* 12500). He took up first the two percentage tests and then the industry recognition test, concerning which he stated:

"Under the *third* test, any sale or service [absent a resale] * * * *will have to be treated by the Administrator and courts as a retail sale or service, so long as such sale or service is recognized in the particular industry as a retail sale or service*" (*id.* 12502).

Petitioner claims that there are more than the three statutory tests of a retail establishment the first of which was listed in his brief before the Trial Court (p. 5) as

"1. The establishment must be engaged in making sales of goods or services or of both."

Here, the Government constantly speaks of "sale of services"—rather than performance—to indicate the difficulty of applying the exemption to most service establishments. Whether or not the statute may be so read as to apply "sale" to "goods" only and not to "services" (see p. 17, *supra*) it should be noted that the expression "sale of services" had its origin in the Administrator's own Bulletins when the statute spoke merely of "selling or service" (See 1941 W H Interpretative Bulletin).

Mr. Justice Frankfurter concluded that the exemption, as originally defined, could not be applied to the rental of space in a loft building not because of the absence of the concept of selling, but because such rental of space was not, as he put it, "the equivalent of selling services to consumers" (*Kirschbaum v. Walling*, 316 U. S. 517, 526, emphasis supplied).

Similar posing of semantic issues by asking what is being sold when a loan is made, by pointing out that money is not a commodity that can be consumed, or that there is an absence of a concept of resale in connection with the lending service (Pet. Br. pp. 8, 47, 49) is not helpful. If the purpose is to make the three tests unworkable, identical criticisms could be made with respect to the rental of hotel rooms, dance halls, funeral homes, crematories and other administratively recognized service establishments. It could be said with equal facility and equal immateriality that a funeral home's services do not constitute a commodity and it is difficult to conceive of the resale of the services rendered by a funeral home, dance hall or hotel room. Indeed, the absence of any possibility of resale only enhances the propriety of applying the retail exemption.

The idea that these semantic difficulties might be controlling hardly squares with the emphatic pronouncement to be found in the House and Senate Conference Reports that "any sale or service will have to be treated by the Admin-

istrator and courts as a retail sale or service, so long as such sale or service is recognized in the particular industry as retail sale or service" (95 Cong. Rec. 14931-2, 14877).

When inquiry was made by Senator Aiken as to the purpose of the words used in setting up the industry recognition test, this answer was given:

"Mr. Holland: They make it very clear, crystal clear, that no one standard can apply to every type of business * * * the Administrator and the courts, as well as the people who are in business, are warned that the rules prevailing in the business, the understanding of the term in the business, would apply, with complete knowledge that the same understanding may not apply in different businesses, because the same standard or rule cannot at all be safely applied to all businesses" (id. 12510).

- (5) ***All establishments are eligible for the application of the statutory definition; personal loan companies are not credit companies.***

It is impossible to reconcile these positive legislative declarations with petitioner's allegation (Br. p. 6) "that there are some types of businesses which are not eligible for the Section 13(a)(2) exemption regardless of the amount or kind of evidence that might be adduced * * *".

Nor is petitioner's position supported by the legislative comment that "banks, insurance companies, credit companies * * *" (95 Cong. Rec. 12505) are not generally considered in a retail category—even if we were to assume that such comment would be controlling. The term "credit companies" is not the equivalent of "personal loan companies."

The Encyclopedia of Banking and Finance, in defining "credit company," refers the reader to "commercial credit companies" (R. 142). Messrs. Henderson, Neifeld and

Schmus testified that the term "credit companies" refers to "commercial credit companies" which make "loans available to business establishments" and that the term does not include personal loan companies which grant credit to individuals for consumption purposes (R. 141, 149). Mr. Schmus never understood or heard in his twenty-five years' experience "the term 'credit companies' as being applied to and descriptive of small, licensed, small loan companies" (R. 149, 150). Petitioner's witness Melnicoff, testified that he did not "recognize the term 'credit companies' as being one that is in general use * * * " (R. 157).

Certainly, "credit companies" was not used in an all inclusive sense so as to include all institutions which extend credit. Such recognized retailers as pawn shops, retail credit furniture stores, etc., also extend credit. Moreover, if "credit companies" were intended to be so all inclusive, why include them among "banks, insurance companies, credit companies etc." all of which extend credit.

And if the question respecting this group was put by a spokesman for the Administrator (95 Cong. Rec. 12505) in an effort to preserve his earlier classification of "personal loan companies", why the change from "personal loan companies" as used in the Administrator's pre-1949 ruling.*

* The question put to Senator Holland, the substance of the answer to which found its way into the Conference Report, was as follows:

"Q. Would the proposed amendment have the effect of exempting banks, insurance companies, *credit companies* * * * etc.?" (95 Cong. Rec. 12505.)

This lumping of "credit companies"—whose dictionary definition refers to "commercial credit companies"—with such recognized commercial lenders as "banks and insurance companies" would hardly suggest that the questioner was seeking a reply which would be applicable to personal loan companies

The proof in this case shows that however "credit companies" may be regarded, personal or small loan companies, as each of three Trial Judges has found, *are regarded as retail businesses in the financial industry.*

All of which demonstrates the danger of interpreting a statute whose language is plain and unambiguous, in terms of legislative comment especially where, as here, the comment itself is of doubtful meaning. Cf. *Gemsco, Inc. v. Walling*, 324 U. S. 244, 260.

(6) *The views of and in the particular industry are not to be rejected as self-serving.*

Petitioner would here give no weight to the views in or by the financial industry. The *Taylor Fertilizer* decision which criticized this position is summarily rejected by the petitioner as "erroneous" (Br. footnote pp. 33, 34). But note what the Senate Report says on this subject:

"It is the intent of the conference agreement to place on each employer claiming the exemption the burden of showing that 75 percent of the particular establishment's sales are not for resale and are recognized as retail in the particular industry. It is expected that the Administrator will investigate the facts in particular industries and determine what sales are recognized as retail in such industries. While it is expected that the Administrator *will give due weight to the views of trade associations*, both in the wholesale and retail fields, the conference agreement does not contemplate that the *interpretation of any interested group should be regarded as controlling. Due weight should be given, for example, to the actual practice in the industry.* The soundness of the Administrator's conclusions may be *tested in the courts*" (95 Cong. Rec. 14877).

Petitioner objects to making industry recognition decisive because of the alleged impropriety of permitting an industry to make its own self-serving definition. Petitioner

is entirely incorrect in stating that "respondents' evidence relating to the 'industry recognition' test was of a self-generated and self-serving nature" (Br. p. 53). This can hardly be said of Schmus, the Cashier and Vice President of the First National Bank of Chicago, Dreibelbis, a Vice President of the Bankers Trust Company of New York or Leon Henderson. Dr. Neifeld wrote of wholesale and retail lending as early as 1933 (*supra*, p. 9).

Senator Aiken, too, asked whether the industry recognition test does not leave it

"pretty wide open for an industry to determine for itself whether it is to come under the provisions or not" (*id.* 12510).

He was told:

" * * * what constitutes a retail sale and what constitutes service * * * is defined variably in various industries by determining what are the habits and practices in the industry" (*id.* 12510).

As Judge Tuttle held in the *Taylor Fertilizer* case, 233 F. 2d 284, 288:

"In the determination of what is recognized as retail in an industry, the opinion of industry members would be relevant, and the trial court did not err in basing its findings of fact upon their testimony."

On the method of applying the amendment, the House Sponsor had this to say:

"Under the amendment *the courts would decide the question of what sales or services are recognized as retail in the particular industry.* An employer claiming exemption would have the burden of proving to the courts that in fact 75% of his sales or services are recognized as retail in his industry. * * * With respect to the third test [industry recognition] it should be

pointed out that the terms 'retail' and 'wholesale' are trade terms well known and commonly accepted in industry." (95 Cong. Rec. 11003-11004.)

And Senator Holland stated:

"How better could the matter be left than by recognizing the dividing line between retail sales and wholesale sales in the particular industry of the thousands of industries which will be affected by this law, leaving to an able Administrator and the just courts to decide between citizens if any question arises?" (*id.* 12502):

When Senator Aiken called the industry recognition test "the joker in the amendment" (*id.* 12519), Senator Holland replied:

"There is no proper background against which to determine the meaning of 'retail sales or services' without looking to see the meaning of the term 'retail sales' or the term 'retail services' in the particular industry which is affected."

Congressman Lucas made a similar comment (*id.* 11115-16).

Senator Taft gave this answer:

"The senior Senator from Florida says that [the industry recognition test] would give the industries the right to decide the matter for themselves. It would not do so. Hardly an industry can be found in which the question of what is retail and what is wholesale has not been settled for years. It is a question of fact just as much as any other question of fact. It is a question of fact which we are perfectly able to determine" (*id.* 12515).

The "question of what is retail and what is wholesale" in the financial industry has been "settled for years" and, by reason of that fact, each of the three trial judges who has heard testimony on the subject has been constrained

to find that a small loan office is recognized in the financial industry as a retail service establishment.

Petitioner constantly reminds the courts that this Court has held that the Administrator's views are entitled to great weight. But such views must now—and here—be considered in light of the attitude displayed by the Administrator toward the 1949 Act both before and since its adoption.

The Administrator sought the adoption of the Lesinski Bill which would have confirmed his pre-1949 administrative interpretations *in toto*. He was defeated and the Lucas Bill, which he opposed, was adopted instead. Petitioner and the Administrator both act as though they had won the battle and they still insist that the pre-1949 administrative interpretations were confirmed and are controlling.

The Administrator opposed the Lucas Bill because it would "substitute a completely new set of definitions". It is now asserted that the amendment contains no binding definition and that the Administrator's "susceptibility" test must still be applied.

The Administrator objected to the adoption of the amendment because, as proposed, it would permit each industry to decide for itself what its status should be under the exemption. The rejection of this objection by Congress has not restrained the Administrator from offering exactly the same objection in the courts.

The Administrator objected to the adoption of the amendment with its new definition because it would add at least 200,000 previously non-exempt workers to the exempt group. The retort that that was due to the Administrator's incorrect pre-1949 interpretations does not deter the petitioner from asserting that the amendment was not intended to expand the number of businesses and workers previously held non-exempt.

It is this stubborn resistance on the part of the Administrator to the 1949 Act that has occasioned the need for court interpretation, not only in the three cases dealing with small loan offices, but also in other fields. See *Mitchell v. Taylor Fertilizer Works*, 233 F. 2d 284, *Boisseau v. Mitchell*, 218 F. 2d 734.

Compare comment of Chief Judge Magruder (former Solicitor of the Labor Department), respecting the Administrator's attitude toward the Belo amendment: "From the start the Administrator of the Wage and Hour Division has disliked the Belo decision and has sought to whittle it down * * *" and though "the new §7(e) [of the 1949 Act] is undoubtedly applicable, if we understand appellant's [petitioner's] contention we are to decide this case just as though §7(e) had not been enacted * * *" *Mitchell v. Brandtjen & Kluge, Inc.*, 228 F. 2d 291, 294-5.

CONCLUSION

However we may admire the Administrator's tenacity and singleness of purpose—to expand the application of the Act—he should not be further encouraged in his effort to attain in the courts that which Congress has refused him.

The most that can be said respecting the "legislative materials" upon which the petitioner so heavily relies, is that there are comments which run counter to the plainly expressed terms of the statute as well as to the sponsors' expressions of intent above set forth. The Court of Appeals, therefore, was fully justified in applying the exemption as written.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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